SUPREME COURT, U. S.

FILED

JUN 24 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 226

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being Creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

vs.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Bergeron and Jack M. Lachmann (being Shareholders), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 12, 1968.

CITATIONS TO OPINIONS BELOW.

The Referee in Bankruptcy's orders are unpublished and unreported and are contained in the certified record and printed in the appendix hereto at pages 55 to 61. The District Court entered no order containing findings of fact or conclusions of law and its minute orders denying relief to appellants are unreported and contained in the certified record. Said orders are printed in the appendix hereto at pages 53 and 54. The opinion of the Court of Appeals is reported in 392 F. 2d 893 and printed in the appendix hereto at pages 37 through 47.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 12, 1968 (see pages 48 to 50 of the appendix hereto); its opinion was filed on February 7, 1968, and petitions for rehearing and rehearing en banc were denied on March 27, 1968 (see pages 51 and 52 of the appendix hereto). Jurisdiction of this court is invoked pursuant to 11 U. S. C. sec. 716, 11 U. S. C. Sec. 47(c) and 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. May the Bankruptcy Court, because it has received an offer for the purchase of all of the debtors' assets, halt the attempt of a publicly-held corporation to effect an arrangement with its unsecured creditors and order

liquidation, where no emergency exists and all evidence points to the possibility of financial rehabilitation?

2. Where a debtor-bankrupt publicly-held corporation has filed a plan of arrangement and before a sale of its assets has been conducted, moved the court to enter an order halting liquidation, thereby permitting it to promulgate a plan of arrangement, does the Bankruptcy Court have a duty to cease liquidation efforts, on indemnity to all parties, until the plan is investigated, or should the court proceed to a sale?

3. Having proceeded to an auction of the debtor-bankrupt's assets while an uninvestigated plan of arrangement is pending, and a deposit to implement the plan is proffered, should the Bankruptcy Court summarily reject the plan and accept the bid without factually determining which method of producing payment to creditors would bring the greatest return and is in the best interest of all parties?

4. May a publicly-held corporation seek to promulgate a plan of arrangement at any stage of a bankruptcy proceeding and where that plan, and the deposit implementing it, by unanimous agreement of the trustee, the debtor and the creditors committee, preserves an equity in existing public shareholders, recreates a going concern, and produces a greater payment to creditors than the highest bid made for liquidation, is the Bankruptcy Court justified in refusing to permit the debtor to promulgate its plan when no vested rights would be disturbed and no innocent bona fide purchasers prejudiced?

STATUTES INVOLVED.

11 U. S. C. sec. 706:

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

. . .

(3) "debtor" shall mean a person who could become a bankrupt under section 22 of this title and who files a petition under this chapter;

(4) "executory contracts" shall include unexpired leases of real property; and

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

11 U. S. C. sec. 721:

Filing petition; pending bankruptcy proceeding

A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication.

11 U. S. C. sec. 722:

Same; original petition

If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication.

11 U. S. C. sec. 723:

Contents of petition

A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature, and shall set forth the provisions of the arrangement proposed by him, or, that he intends to propose an arrangement pursuant to the provisions of this chapter.

11 U. S. C. sec. 725:

Petition in pending bankruptcy proceedings as stay

A petition filed under section 721 of this title shall not act as a stay of adjudication or of the administration of the estate, but the court may upon application of the debtor and upon notice to all parties in interest, including the creditors' committee and the receiver or trustee, if any such has been appointed, grant a stay of adjudication or of the administration of the estate upon such terms as may be proper for the protection of the estate and for indemnity against loss thereto or diminution thereof.

11 U. S. C. sec. 756:

An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.

11 U. S. C. sec. 757:

An arrangement within the meaning of this chapter may include—

(1) provisions for treatment of unsecured debts on a parity one with the other, or for division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) provisions for the rejection of any executory contract;

(3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;

(5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement, in priority over the debts affected by such arrangement;

(7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and

(8) any other appropriate provisions not inconsistent with this chapter.

11 U. S. C. sec. 766:

Requisites for confirmation

The court shall confirm an arrangement if satisfied that—

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of the creditors and is feasible;

(3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

(4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this title.

Confirmation of an arrangement shall not be refused . . . because . . . the interest of its stockholders . . . will be preserved. . . ."

11 U. S. C. sec. 776:

Abandonment or rejection of arrangement before confirmation

If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 721 of this title, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this title; or

(2) where the petition was filed under section 722 of this title, enter an order, upon hearing after notice to

the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors

11 U. S. C. sec. 793:

Unregistered securities; use of mails and interstate commerce

a. The provisions of section 77e of Title 15 shall not apply to—

(1) any security issued by a receiver, trustee or debtor in possession pursuant to section 744 of this title; or

(2) any transaction in any security issued pursuant to an arrangement in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transaction by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (b) transactions by a dealer as to securities constituting the whole or part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the arrangement.

b. As used in this section, the terms "security", "issuer", "underwriter", and "dealer" shall have the meanings provided in section 77b of Title 15.

STATEMENT.

This was an original proceeding instituted by Webcor, Inc., and Webcor Sales Company (hereinafter sometimes referred to as "companies" or "Debtors") to effect an arrangement with their unsecured creditors pursuant to Chapter XI of the Bankruptcy Act. Appeals are prosecuted from the refusal of the District Court to permit

Debtors to promulgate a plan of arrangement and from an affirmation of an order selling all of Debtors' assets.

Webcor, Inc., and its wholly-owned subsidiary, Webcor Sales Company, have engaged in the marketing and distribution of household electrical appliances, phonographs and radios for the United States Government for some fifty years. Appliances are marketed under the trade name "Dormeyer"; all other goods bear the name "Webcor."

The main manufacturing plant is located on Wolcott Avenue in Chicago, Illinois; the parts department on North Avenue in Chicago, Illinois, and the plastic division at Zeeland, Michigan. All told—when manufacturing—it employed in excess of five hundred people. Webcor, Inc., is a publicly-held company, having three thousand shareholders, and was listed on the Midwest Stock Exchange.[1]

In April of 1967, the Companies ceased manufacturing in Chicago, although they continued marketing products contract-manufactured for them by others and continued servicing their products, employing about two hundred thirty persons. On July 5, 1967, the Companies filed a petition pursuant to Chapter XI of the Bankruptcy Act, praying for an arrangement with their more than two thousand creditors. For "good cause shown" extensions of time to file schedules were granted to September 21, 1967.

The Schedules (filed September 21, 1967) and claims reveal: claims entitled to priorities—$263,000.00; unsecured creditors—$2,800,000.00; secured creditors—$1,680,000.00; contingent liabilities of $1,000,000.00[2] and rentals of about $120,000.00 per year.

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1. Webcor, Inc., was delisted upon the filing of the petition although its stock is still traded over the counter.

2. Contingent liability arises in the following manner: While there is a secured loan which is in excess of $1,600,000.00 the security was not all owned by the Companies—$1,000,000.00 is property owned by others who are accommodation-makers. If the Companies liquidate and the property is foreclosed upon, the accommodation-makers would be entitled to recover their loss.

The assets, aside from accounts receivable, consist of: non-perishable heavy and light manufacturing machinery; office furniture, fixtures and IBM equipment; non-perishable finished goods, work in process and raw material; trade names "Dormeyer" and "Webcor"; an $11,000,000.00 tax-loss carry forward; certain vacant property (encumbered) and a plant situated upon leased ground, also encumbered.

Within a short time after the Receiver qualified, all business activities, except parts shipments, ceased upon Court Order.

On July 6, 1967, pursuant to the Companies' application, Frank M. Whiston was appointed Receiver and qualified.

From the date the petition was filed (and especially after the schedules were filed on September 17, 1967) the Receiver, various creditors, third parties, and the Debtors sought to procure the backing necessary to promulgate a Plan of Arrangement. Indeed, respondent, International Fastener Research Corporation (hereinafter referred to as IFR), was in constant communication with the Debtors, attempting to induce the Companies' majority stockholder and the Debtors to permit it to promulgate a Plan of Arrangement. They were unsuccessful.

On October 12, 1967, approximately three months after the filing of the original proceedings and less than three weeks after the filing of the schedules, in this extremely complicated situation an ex parte Order was entered directing the Debtor to file its proposed Plan by October 25, 1967, which order also set a hearing for October 25, 1967, at 2:00 P. M. to consider entering an Order of Adjudication. Appropriate notice was given.[3] The first meeting of creditors was set for that date.

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3. It is interesting to note that the Receiver served notice that on October 12, 1967, he would appear before the Referee to ask for a solicitation of bids. No action was taken on that petition; instead, the above order was entered and notice sent.

On October 17, 1967, during the pendency of the Chapter XI proceedings, the Receiver filed a petition whose only important allegation is:

> "2. That he has received an offer to purchase all these assets of the debtor, exclusive of cash on hand, together with all the assets of Webcor Sales Company, which case is now pending in this Court, Number 67 B 4935, exclusive of the cash on hand in that Company. This offer is in the sum of $1,030,000.00 and has been received from International Fastener Research Corporation, together with an earnest money deposit of $100,000.00. Your petitioner has determined that the International Fastener Research Corporation is a well rated company."

and prayed:

> "WHEREFORE, your petitioner asks that an order may be entered herein authorizing him to sell the assets as hereinabove set forth, free and clear of all liens, by return of bids before this Honorable Court and in accordance with the rules of the Court, to creditors and to the general public; that the said notice recite that a firm offer has been received in the sum of $1,030,000.-00 and that the first bid above that price must be in increments of $50,000.00 and that after the first bid, further bids may then be made in increments of $10,-000.00 . . . ."

Pursuant to that petition, the Court entered an Order

> "That it is the best interests of this estate that the Receiver herein be given leave to solicit bids . . ."

and, accordingly, November 6, 1967, at 2:00 P.M. was set for a return of bids.

On October 25, 1967, the first meeting of creditors convened and the motions previously set came on for hearing. At that hearing, the following events transpired: First, the "feuding" rival Creditors' Committees were fused into one twenty-four man committee representing $1,500,000.00

in claims and officially appointed; Second, the matter of adjudication came on for hearing.

Mr. Nachman, attorney for the Debtor companies, explained the efforts the Debtor was making and that he had just left a meeting with various parties who were desirous of promulgating an Arrangement. He outlined to the Court a proposed Plan[4] and asked that the Order of Adjudication be withheld until November 6, 1967. In this position he was backed by the Creditors' Committee, who said:

> "And it is our suggestion, your Honor, the Creditors' Committee suggestion together with Mr. Nachman's statement that an Order of Adjudication be deferred until November 6th, which is the day of the bid. If we don't have a Plan to submit by that day, we don't intend to delay any longer . . . Therefore, we suggest that an Order of Adjudication be postponed until November 6th."

A former employee of the Companies (since 1940), although pleading for his wages, said:

> "I would like to see this company back in business and I think a lot of people who worked there would like to be back there working because they spent a lifetime there, and I am talking to a lot of these people. I wish the Court could see to it that this company will get back in business."

The former Vice-President of National Video Corporation informed the Court that the Debtor was capable of reorganization and asked until November 6th to formulate a Plan. The only opposition was the Receiver, whose attorney said:

> "Four months have gone by since our doors have been closed in this situation. It is costing this estate a minimum of $25,000 a month just to preserve these

4. In fact, the Plan eventually filed herein.

assets alone.[5] I don't know how much it is costing us in the delay of a sale or a plan. This is hard to calculate, but it is thousands and thousands of dollars. And, I do feel that the creditors, the debtors, and everybody involved in this case have had ample time in the last four months to present a plan of arrangement. And I do think that this Court at this time should enter an order of adjudication unless somebody comes up with a guarantee that we will get at least a million dollars in cash or—for the assets of this estate. I don't want to lose that firm bid that we have today."

The Court entered an Order of Adjudication, saying, however:

"If between now and November 6th a Plan can be formulated that would deserve consideration why we shall consider it."

The Order of Adjudication also set forth the possibility of a plan being filed. On November 2, 1967, after the full Creditors' Committee, at a meeting, approved a proposed Plan, subject only to financial ability, that Plan of Arrangement was filed by the Debtor in the office of the Clerk of the United States District Court.

The Plan provided:

(1)	Payment to all creditors entitled to priorities	$ 263,000.00
(2)	Creditors under $100.00	35,000.00
(3)	Costs of administration	200,000.00
(4)	Expenses incurred after July 5, 1967[6].	200,000.00
(5)	Unsecured general creditors	1,400,000.00
(6)	Shares of A. F. Dormeyer Corporation to be transferred to Debtors, Value—approximately	400,000.00
	Total	$2,498,000.00

5. This $25,000.00 figure was not broken down. It is also interesting to note that during this time the Receiver also collected over $175,000.00 by virtue of sale of finished goods, parts and collection of receivables. None of this was brought to the Court's attention, nor was any report filed.

6. These are the Receiver's expense such as rent, cost of maintaining the property.

The cash requirements of the Debtors, with Dormeyer backing, to meet creditors' payments upon confirmation under the original Plan as filed herein, were the sum of $1,058,000.00, of which the general unsecured creditors would receive $560,000.00 upon confirmation; $840,000.00, of which the general unsecured creditors would receive $560,000.00 upon confirmation; $840,000.00 to be received by them over sixty months in notes guaranteed by A. F. Dormeyer Corporation.

In addition, the Plan would preserve a twenty-one percent interest in present shareholders and require a working capital contribution by A. F. Dormeyer Corporation of $750,000.00.[7]

A. F. Dormeyer Corporation had also guaranteed the Debtor that if the Plan were not confirmed within one year, it would guarantee the estate $1,030,000.00.

On November 6, 1967, pursuant to notice, the Debtor filed its motion to vacate the Order of Adjudication, reinstate the Chapter XI proceeding, halt liquidation, and prayed for a reasonable time to present the Plan to its creditors.

When the Petition came on for hearing, the Creditors advised the Court that they had been willing to accept the Plan, subject to proof of financial ability to carry it out. The debtor also offered to indemnify the estate and all parties for any expense incurred as a result of the return of bids. However, IFR, although then represented at the hearing, even though they were not parties, increased its offer to $1,500,000.00. The Creditors then asked that the bids be taken at 2:00 P. M., and that the Motion be heard after the bids, indicating that there would be ninety percent of the Committee at the 2:00 P. M. hearing. In fact, only

7. The Plan had the added advantage of relieving the estate of contingent claims, of landlords' and payment of certain secured obligations.

twelve of the twenty-four-member Committee did appear and deliberate at said hearing.

The Referee desired to set the Motion over for the next day to "spend the day, if necessary, going into the matter." Mr. Quittner, on behalf of IFR, informed the Court that he could not give assurance that his client would maintain its offer beyond 5:00 P. M. that day so the Motion was taken under advisement until that afternoon.

The hearing was then adjourned until 2:00 P. M. of that afternoon. At that time bids were being taken and Mr. Quittner increased the bid on behalf of IFR to $1,508,000.-00. Whereupon, the Referee addressed Mr Quittner as follows:

> "Referee: International Fastener is aware of the predicament existing. It may be that acceptance or rejection of the bid by the Court may have to be delayed for a day or two. A motion arose this morning which we feel needs to be disposed of before final acceptance or rejection of any bid."
>
> "Mr. Quittner: Your Honor, the offer of International Fastener as of this moment, at least, will expire this evening at 5:00 P. M. If additional circumstances develop which appear compelling, International Fastener . . . might be willing to extend the time until tomorrow morning."

IFR finally bid $1,775,000.00, and again the Referee cautioned that acceptance or rejection of the bids "may be today and it may be tomorrow and it may be a couple of days from now. I just don't know."

After having said: "As I said earlier, is subject to acceptance or rejection when those other matters pending before the Court are disposed of."

During the bidding, Mr. Gesas, representing stockholders and certain creditors, attempted to advise the bidders of a new proposal to be made by the Debtor, and having been denied the privilege by the Court, stated: "We can address ourselves to the Plan after the bidding is concluded."

Thereupon, Mr. Nachman informed the Referee that the Dormeyer interests were behind the Plan of Reorganization and were prepared to make available to the Debtor the sum of $1,800,000.00 in cash the following morning and deposit the same with whomsoever the Court might direct for the purpose of carrying out the Chapter XI Arrangement.

The Referee then suggested that Mr. Gesas and Mr. Nachman get together with the Creditors' Committee and its counsel. Then Mr. Quittner suggested that if the Debtor had serious intentions of depositing $1,800,000.00 to a third party, they should be there with their funds that day, and advised, in answer to an inquiry by Mr. Nachman, that while IFR did not have its money in Court on that day, it could have it there.

Mr. Gesas then informed the Referee that he had $1,800,000.00 in Court to implement the Plan and was prepared to deposit it that afternoon. The Court thereupon adjourned, to be reconvened at 3:30 P.M. It reconvened at 3:30 P.M. and again adjourned to be reconvened at 4:00 P.M.

When Court finally reconvened that afternoon, and although the bidding was not reopened, IFR was authorized to offer $1,825,000.00.

The Creditors' Committee then reported to the court that they recommended the bid of IFR be accepted, stating that a majority of their members had voted for acceptance of the bid. It was not then indicated to the court that of the twenty-four-man committee only twelve were present and seven had voted for the bid and five against. At the conclusion, the Referee stated:

> "I specifically asked Mr. Gesas if his figure was bid and he said it was not. I don't see that it is up to me to reject a bid that was the high bid and has now been

increased, after talking with creditors. And on the recommendation of the Creditors' Committee, the bid of $1,825,000.00 of International Fastener will be accepted.

"Will you prepare a draft order . . .

• • • • •

"In the face of all that has transpired (the motion to vacate) will be denied and the order of adjudication will stand."

No hearing was conducted on the Plan. On November 7, the Referee entered a draft order denying the motion to vacate. The order recited the Creditors' Committee recommendations, the bidding, and that the Plan had been filed without leave of Court. Simultaneously, an order approving the sale was entered, which recited in part:

". . . International Fastener Research Corp. shall pay the full balance of the purchase price to the Receiver . . . Within one banking day after this order becomes final and not appealable . . . In the event that this order does not become final on or before the 11th day after its entry . . . then International Fastener Research Corp. shall in its sole option and discretion be relieved from all the provisions of this order . . ."

On November 15 and 16, Petitions for Review of the Orders of November 7 were filed by appellants, representing $900,000.00 in creditors, $1,000,000.00 in contingent liabilities and 490,000 shares of stock. The Petitions for Review challenged the Referee's orders for their failure to find substantiation in the record, for failure to follow the mandate of the Bankruptcy Act, and for abuse of the discretionary powers vested in him.

On November 16, 1967, a Motion to Stay, pursuant to Section 39 (c) was made by appellants. We asked that conditions be set protecting all parties. This was denied. Nor was a three-day extension for the period of review granted, since:

"Referee: You have to appreciate the scarceness of time available here to do anything."

Not even a one-day extension was available.

Moreover, when counsel sought to introduce pertinent evidence to support his position, not only was that evidence excluded, but an offer of proof was denied.

On November 17, 1967, appellants filed a petition to stay the enforcement of the Referee's Orders before the District Judge to whom the petitions for review had been assigned. The District Court was engaged, so hearing on said petition was continued until November 20, 1967, the day on which the petitions for review were set and IFR agreed not to withdraw its bid until 5:00 P.M. on November 20.

At the hearing before the Court on November 20, all parties were present. Mr. Nachman, for the Debtor, led off:

"Mr. Nachman: That I have in my possession a certified check in the sum of $1,000,000.00, made payable to the order of Frank Whiston, as Receiver in Bankruptcy of Webcor, Inc., and Webcor Sales Company.

This check, Your Honor, is accompanied by a letter addressed to Mr. Whiston, which has been delivered to Mr. Whiston's counsel, Mr. Kessler, for his examination.

Mr. Kessler and I agree that it would be proper that an order be presented to Your Honor's consideration or the Referee's consideration, depending upon which way your Honor thinks this should be handled, authorizing the Receiver to accept this check on the conditions set out in this letter, and these conditions, I understand, are agreeable to Mr. Kessler, Mr. Whiston's counsel.

Your Honor, this is being done virtually simultaneously with the Debtors' filing an amended arrangement. This is all part of the procedure which we are

now setting forth before your Honor and for this record.

The amended arrangement is being typed in my office now, and will be ready for filing, I hope, before the day is over. It will provide that there will be paid to unsecured Creditors 50 per cent in cash on confirmation of the arrangement.

In addition to those payments, there will be paid all priority claims allowed by the Court, and all costs of administration.

"The Court: When will they get the 50 per cent?

"Mr. Nachman: On confirmation of the plan, your Honor, and if the Committee is able to assist the Debtor in obtaining the necessary consent, and I am confident that the Committee will be able to do this, my best guess this morning, your Honor, and I hope I won't be kept to it, is that certainly by the end of December we ought to have a confirmation on the Chapter XI proceeding. I would hope it would be sooner than that, depending on how well the parties are able to work together, and I know every one is eager to work together.

I should like to point out, also, your Honor, that it is a condition of this deposit that if for any reason a confirmation cannot be obtained on the Chapter XI proceeding, and the property has to be resold, and if the sale produces less than $1,825,000.00 net, that this sum of $1,000,000.00 would be available to make up the deficiency, whatever it might be. This is one of the terms incorporated in this letter addressed to Mr. Whiston."

The Court inquired whether "this proposed Plan contemplates operation . . ." and was answered affirmatively.

The Court was informed that under the Amended Plan the creditors would receive fifty cents on the dollar upon confirmation, and that the shareholders would retain a twenty-one percent interest in a going concern.

The Receiver's attorney then backed the Plan, since it would produce fifty cents on the dollar for creditors, which

was more than the sale would produce. The Creditors' Committee attorney then backed the Plan for the same reason as the Receiver's attorney. Appellants urged acceptance of the Plan. The Receiver, in response to the Court's question, also stated that the Plan was in the best interest of creditors.

IFR—and for the first time Dynamic Corporation of America—objected on the grounds that since an Order confirming the sale had been entered, that Order could be upset only upon proof of fraud or mistake. Argument on said question was pursued and appellants addressed themselves to the matters then pending before the Court, i.e., the petitions for review and the motion to stay. The Court, after saying he was not acquainted with the law, thereupon denied the petitions for review, denied the motion to stay, and sent the matter back to the Referee with "full power to proceed under Chapter XI . . ."

All parties adjourned to the Referee. After familiarizing the Referee with the proceedings before the Judge, argument was begun by IFR and then other parties in interest proceeded. The matter was continued until the following morning, November 20.

At the opening of court the following morning, the Debtor filed a motion to reconsider and an amended Plan. Appellants proceeded to argue, whereupon one of the attorneys for the Creditors' Committee interrupted and requested permission to permit the co-chairman of that Committee to make a statement. IFR objected on the ground that he was not an attorney. Appellants then called him as a witness, but the Court refused to allow him to take the witness stand. Appellants then sought to make an offer of proof, but this was denied.[8]

8. The testimony was important, since Mr. Troy would have testified that the Plan had been accepted by the full Committee before November 2, and that as a result only twelve of the twenty-

Appellants thereupon advised the Referee that they had participated in the hearing only as a matter of courtesy, believing that the District Court's Orders were final appealable Orders, and that they now withdrew to prosecute those appeals.

At 11:00 A.M., on November 21, 1967, Notice of Appeal from the District Court's denial of the Petitions for Review was filed and notice served upon all parties—which notice was read into the record—that appellants were to apply at 2:00 P.M. for supersedeas.

The Referee, after stating that he was sorry he was again called upon the render a hasty judgment without adequately reviewing the matter, denied the motion for reconsideration. The Referee said he was impressed with the sanctity of judicial sales—the hearing adjourned.

The Receiver thereupon gave IFR a Bill of Sale and accepted the purchase price. Appellants were not informed of this until the hearing at 2:00 P.M. before the District Court on the Motion for supersedeas.

At that hearing, IFR and Dynamics urged the Court not to grant any stay since they would miss the Housewares Show and probably would abandon the entire matter. The Judge thereupon denied any stay and affirmed the oral order of the Referee denying the Motion to reconsider; which oral order was reduced to writing on December 5, 1967. Appeal from this affirmance was also prosecuted.

The Circuit Court of Appeals, pursuant to an emergency application, granted a stay upon the posting of $1,025,000.00 in bonds, which was done. The Court also permitted Webcor, the debtor, to intervene as an appellant. On January 12, 1968, the stay was vacated and the Court entered an Order affirming the District Court. On February 7, 1968, the Court's Opinion of Affirmance was filed.

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four members were in attendance on November 6, and that five had voted for the Plan and seven for the sale; that upon polling the entire Committee, all but one backed the Plan. He would have further testified to the advantages of the Plan.

REASONS FOR GRANTING THE WRIT.

1. THE DECISION TO ALLOW THE ORDER OF ADJUDICATION TO STAND IS IN CONFLICT WITH THE BANKRUPTCY ACT AS INTERPRETED BY THE SUPREME COURT.

This proceeding began as an attempt by a publicly held corporation to rehabilitate itself through the use of the provisions of Chapter XI of the Bankruptcy Act.

On June 22, 1938 Congress enacted into legislation Chapter X of the Bankruptcy Act, 52 Stat. 883, and Chapter XI of the Bankruptcy Act, 52 Stat. 903. The avowed purpose of both provisions was to permit a debtor in financial difficulty to use the auspices of the Bankruptcy Act for rehabilitation. See *SEC* v. *American Trailer Rental Co.*, 379 U. S. 594, 617, 85 S. Ct. 513, 526, both at footnote 17 (1965).

After the enactment of these provisions, because of the Supreme Court decisions in *Case* v. *Los Angelos Lumber Products Company, Ltd.*, 308 U. S. 106, 60 S. Ct. 1 (1939), and *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 60 S. Ct. 1044 (1940), the prevailing view was that a publicly held company seeking rehabilitation was confined to the use of Chapter X.

In 1952 Congress amended Section 366 of the Bankruptcy Act, 11 U. S. C. Sec. 766, by eliminating the necessity that a plan be "fair and equitable," said amendment being for the purpose of abrogating the rule of "strict priority" in Chapter XI proceedings, Senate Report No. 1395, 82nd Congress, 2nd Session, 11 (1952). At the same time Congress amended Section 324 of the Bankruptcy Act, 11 U. S. C. Sec. 724(1) thereby permitting an extension of time for filing schedules "for cause shown."

Largely because of these changes the Supreme Court in *General Stores Corporation* v. *Shlensky,* 350 U. S. 462, 76 S. Ct. 516 (1956), held that Chapter XI was an appropriate vehicle for the rehabilitation of a publicly held corporation.

In 1958 Congress amended Section 323 of the Bankruptcy Act to provide that the debtor need not accompany the petition for an arrangement with a plan 11 U. S. C. 723 (as amended 1958). The purpose of this was to permit "time for the careful drafting of an effective and fair plan of arrangement. . . ." Senate Report 2094, 85th Congress, 2nd Session 1958. Thereafter in *SEC* v. *American Trailer Rental Co.,* 379 U. S. 594, 612, 613, 85 S. Ct. 513, 523 (1965), this court in recognition of the difference between a publicly held company and an individual, specifically authorized protection of public shareholders, including intervention of the United States Securities and Exchange Commission.

This court also recognized, by permitting the protection of the public shareholder in a Chapter XI proceeding, the necessity of treating a publicly held corporation different from that of a private individual or an individually held enterprise seeking relief. In the case of an individual or an individually held enterprise, the debtor adequately represents the economic interest of the applicant since in effect the debtor and the owner are one and the same. On the other hand in a publicly held corporation the shareholder divorced from management, does not even receive notice of the proceedings or any occurrence therein, and has no method, outside of court stewardship, of protecting his vital interests. Moreover, the court recognized that the shareholder divorced from management has no control over the attempts of the debtor to affect the arrangement.

The Court of Appeals, as part of its rationale in sustaining the referee's order of adjudication, has stated that the debtors were dilatory in taking two months to file schedules and that these schedules should have been pre-

pared before institution of the original proceedings. The debtors received extensions for "cause shown" because of the complication of its financial structure. Moreover, the very purpose of the Bankruptcy Act Amendments was to remove this feature from the court's consideration. Thus, the rationale of the Court's holding is in direct opposition to the Congressional enactment.

Furthermore, the penalty inflicted by the Court is against the public investor who has no control over the management and whose interest, by virtue of this Court's decisions became a ward of the Court.

The view of this Court of Appeals that this prolonging of the filing of schedules was prejudicial to the debtor's attempted rehabilitation must, we respectfully submit, stem only from the application of principles governing the actions of an individual before the court rather than from the view of owners divorced from control and management. As such we respectfully submit the holding is in direct conflict with both the Congressional statutes and their interpretation by this Court.

Viewing this proceeding with the same concepts that govern an individual coming before the court has led the Court of Appeals into another error. An individual whose efforts to effect an arrangement are unsuccessful has no cessation of economic life. Relieved of his burdens, which is the purpose of the Bankruptcy Act, he is now permitted to once again continue his economic life. In the case of a publicly held corporation a discharge in bankruptcy without an arrangement means nothing. Where bankruptcy is ordered, the economic life of the corporation and those depending on that economic life is brought to an end. Thus that part of the Act which benefits the individual creates nothing but harm for the public corporation, its shareholders, creditors, employees and the community in which it exists. It is for this reason we respectfully submit

that in every case where an adjudication has been ordered, there has been a finding that rehabilitation is impossible. See *e.g. c.f. John Hancock Mutual Life Ins. Co.* v. *Casey,* 141 F. 2d 104 (1st cir. 1944); *In re Riddlesberg Min. Co.,* 224 F. 2d 834 (3rd cir. 1955).

The test set down by the Supreme Court recognizes this principle. Thus in *SEC* v. *American Trailer Rentals Co.,* 379 U. S. 594, 618, 85 S. Ct. 513, 526 (1965), the court said:

> ". . . it must be recognized that Chapters C and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills. See *Fidelity Assurance Assn.* v. *Sims,* 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 1032."

Under the aforesaid decision, before liquidation could be ordered and efforts to rehabilitate called to a halt, the court had to make a determination that there was no possibility of rehabilitation and the financial life of the debtor was terminal. No such determination has ever been made in this proceeding. Indeed a plan of arrangement was filed. That plan clearly demonstrated the possibility of rehabilitation. That plan as amended not only demonstrated that this corporation's economic life was not over, but that the cessation of its economic life would be at the expense of the investing public.

We are not unmindful of the fact that

> ". . . business had ceased to operate approximately two months prior to July 6 and the receiver was expending in excess of $25,000 monthly to preserve their assets. Faced with these facts and with a firm bid for the purchase of the corporations' assets . . ."

Such facts do not support the rationale that rehabilitation was not possible. Indeed the referee made no such findings and recognized the contrary in his order. All facts on the day of adjudication pointed to a contrary position and was

borne out by subsequent events. The decision of the Court of Appeals that liquidation at the expense of the public investor and creditor need not stem from rehabilitation capabilities "results in a decision reflecting the 'particular experience and predilections of the district judge (or referee) involved' . . ." *SEC v. American Trailer Rentals Co.*, 379 U. S. 594, 617, 85 S. Ct. 513, 526 (1965). It was for this reason that the very same contention under similar facts was rejected in *In Re Solar Mfg. Co.*, 176 F. 2d 493 (3rd Cir. 1949), where the court said:

> "If this were all there were to the case, however, it would be a serious question whether we would be justified in saying no to a business transaction urged by the trustees and satisfactory to the court. In the view we take of the case, however, we are not substituting our discretion for theirs. We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists . . ."

Nor was the Court powerless to act as it indicates in its opinion. November 4, 1967 was a Saturday; by statute therefore the last day to file a petition for review was November 6, 1967, Rule 6, Fed. R. Civ. P., 28 U. S. C. (as amended 1966). The debtor's application for reinstatement of Chapter XI having been filed within that time, the period of review does not begin to run until its denial. See *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 150, 63 S. Ct. 133, 137, footnote 5 (1943). (Not abrogated by statute. The Court of Appeals decision is therefore in conflict with that of the Supreme Court. If this decision stands no longer need orders be based on criteria which furthers the Bankruptcy Act's purpose but solely on the particular predilection of the referee.

2. THE CRITERIA FOR THE REFEREE'S EXERCISE OF DISCRETION PERMITTED BY COURT OF APPEALS OPINION IS IN CONFLICT WITH THE SUPREME COURT DECISIONS.

The Court of Appeals avoided review of the order of adjudication by vesting in the referee discretion to vacate his order, yet it set no standards for the exercise of discretion.

On November 2, 1967, a plan of arrangement was filed by the debtor and on November 6 a motion to reinstate the arrangement proceeding was made. On November 6 there was an attempt to amend that plan. All relief was denied. The order approving the sale and denying the debtor to promulgate its plan was based solely on the recommendation of the creditors' committee. As noted by the Court of Appeals opinion, no findings were made on whether liquidation or the plan would yield more to creditors or be in the best interest of all parties. The Court has now sustained the proposition that the sole basis for the referee's action is the creditors' committee recommendation. If Congress had intended such judicial discretion to be exercised by the committee it would have so provided. Yet the abrogation of judicial responsibility has now been sustained.

Such criteria have been rejected by this Court. In *National Surety Company* v. *Coriell*, 289 U. S. 426, 53 S. Ct. 678 (1933) a plan of composition was approved by the district court without independent findings and solely on the basis of the recommendation of the major creditors. Mr. Justice Brandeis in reversing for a unanimous court said:

> "The nonassenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data. The District Court had before it, in support of the plan,

> only informal, inadequate, and conflicting ex parte assertions unsupported by testimony. It undertook to pass upon the wisdom and fairness of the plan of reorganization and the rights of nonassenting creditors. For the proper disposition of these questions, definite, detailed, and authentic information was essential. Such information was wholly lacking." (at page 681)
>
> * * * * *
>
> "Every important determination by the court in receivership proceedings calls for an informed, independent judgment. In the case at bar special reasons existed why the court should have secured adequate, trustworthy information. The proceeding was not an adversary one; and jurisdiction rested wholly upon the consent of the defendant corporation." (at page 682)

If a plan, having majority acceptance, cannot be confirmed without a proper determination of its effect *a fortiori*, it can not be rejected and liquidation ordered without such determination.

The reasoning is simple. Those creditors not before the Court by representation on the creditors' committee have as much right to the Court's protection as those on the committee. The reasoning in this cause is more compelling for here the Court must protect the public shareholder who is otherwise not represented. *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 85 S. Ct. 513 (1965).*

Again in *SEC* v. *American Trailer Rentals Co., supra,* at note 17, Mr. Justice Goldberg noted with approval:

> "This provision has been construed to preclude confirmation of a plan or arrangement where the plan would pay the creditors substantially less than they might expect to realize in liquidation . . ."

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* It would seem imperative in this cause since the twenty-four member creditors committee representing $1,500,000.00 of the debtors' $2,800,000.00 indebtedness only twelve were present and seven voted for liquidation and five for the plan.

Conversely, we submit, that liquidation which realizes less for creditors than a plan can not be confirmed. Yet we respectfully submit no determination of this was made below nor is it required by the Court of Appeals opinion.

Allowing the referee to make a determination without an informed independent inquiry to determine which conflicting alternatives best meet the purpose of the Bankruptcy Act is the very "open-ended discretion . . . which is bound to result in decisions reflecting the 'particular experience and predilection of the district judge involved' . . . 'the consequences, particularly in a multi-judge district would be that substantial rights of the parties would depend on the accident of the calendar—in defiance of the memorable admonition, it will not do to decide the same question one way between one set of litigants and the opposite between another' . . .," rejected by Mr. Justice Goldberg in *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 619, 620, 85 S. Ct. 513, 527 (1965).

For these reasons, we submit, the Court of Appeals' decision is in conflict with those of the Supreme Court.

3. HOLDING THAT A JUDICIAL SALE CAN NOT BE SET ASIDE RENDERS APPELLATE REVIEW MEANINGLESS AND IS IN CONFLICT WITH OTHER CIRCUITS.

On page 7 of the Court of Appeals opinion, that court said:

> "We note at the onset that a confirmed judicial sale such as the one here can be set aside on appeal only if the referee was guilty of an abuse of discretion."

Yet on page 9 of the Court of Appeals' opinion, it said:

> "Once the sale of the assets to I. F. R. C. was confirmed, the existence of fraud, mistake, or a like infirmity would be necessary to set that confirmed sale aside."

Petitioners are unable to determine the criteria to be applied in appellate review of sales in the Bankruptcy Court. Apparently the Court of Appeals meant that an abuse of discretion could only occur if there was fraud, mistake, or an irregularity in following the statute. Such a holding, is in direct conflict with every circuit in which similar matters have come up. See *e.g. Procter & Gamble Mfg. Co.* v. *Metcalf*, 175 F. 2d 207 (9th Cir. 1949); *In re Pure Penn Petroleum*, 188 F. 2d 851 (2d Cir. 1951); *Webster* v. *Barnes Banking Co.*, 111 F. 2d 1003 (10th Cir. 1940); *In Re Solar Mfg. Corp.*, 176 F. 2d 493 (3rd Cir. 1949).

The court's opinion that a judicial sale once confirmed by the referee can not be set aside except for infirmities that appear outside of the record renders appellate review meaningless. If Congress had intended that the referee's action be the final say it would not have vested in the District Court, the Court of Appeals, and this court the power to review bankruptcy sales.

The rationale of the Circuit Court of Appeals was that it was necessary to render judicial sales unassailable in order to permit bidders to freely come into the bidding.

However, in this cause the purchaser at the judicial sale was a participant in the proceedings from the beginning and sought to effect an arrangement itself. At the time of the bidding it knew that a plan had been filed. At the time of the bidding it knew that the debtor would seek to promulgate that plan.

While the law attempts to protect innocent bona fide purchasers, it does not seek to protect those who take subject to infirmities that they are aware of. Here the purchaser was aware at each stage that the plan might be accepted and even the order confirming the sale provided that the sale was not to become final until appeal had been exhausted. Thus, the rationale of the Circuit Court of Appeals stands for the proposition that the mere bidding

creates an unassailable position which though it violates the principles and purposes of the enabling Bankruptcy Act can not be attacked because the "hammer" has fallen. As such it is in direct conflict with *In Re Solar Mfg. Corp.*, 176 F. 2d 493 (3rd Cir. 1949).

That case was a Chapter X. However, the facts and circumstances are very close. In that case the Trustee was operating the business at a loss but had made progress toward overcoming the loss. No plan had been filed as yet. The Trustee petitioned to sell the assets on the basis of a firm bid conditioned upon immediate acceptance which he alleged would be in the best interest of the estate. The referee permitted the sale. The District Court affirmed the sale; the Circuit Court of Appeals reversed, saying:

> "We think that sales under court order not in pursuance of a reorganization plan are to be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken . . .
>
> * * * * *
>
> "The trustees, as appellees, have taken the position that Solar's assets are further rendered 'perishable' by the fact that Sprague's offer is conditioned upon almost immediate acceptance. This contention asserts the self-destructive proposition that an offer of purchase may itself beget the emergency which is prerequisite to its acceptance and suggests that an impatient purchaser may stampede a reorganization court out of the safeguards of Chapter X.
>
> "If this were all there were to the case, however, it would be a serious question whether we would be justified in saying no to a business transaction urged by the trustees and satisfactory to the court. In the view we take of the case, however, we are not substituting our discretion for theirs. We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists. . . ."

Thus, there is a conflict in the Circuit Courts concerning this important matter.

4. CLASSIFYING THE DEBTOR AS A BIDDER IS IN DIRECT CONFLICT WITH CHAPTER XI.

The Debtor sought, on the afternoon of November 6, 1967, to amend its plan for an immediate pay-out. The only difference in the plan would have been an all-cash immediate payment to creditors instead of a partial cash payment and liquidating dividends. This was attempted before the close of bidding. It sought to make a deposit of $1,800,000.00 at that time to implement this plan. It did, on November 25, 1967, before the District Court, so amend the plan, and informed the court. The normal process of Chapter XI would have permitted it to do so in an orderly fashion and if its motion to promulgate a plan had been ruled upon favorably. It was necessary for it to act speedily because at each stage of the proceeding its plea went unheard. The Court of Appeals has held that the Debtor was actually a bidder and was outbid at the sale.

We respectfully call this court's attention to the fact that from a factual point of view this is untrue. No investigation was made by the referee or the District Court into the question of whether the plan or the bid would yield the greatest amount to the estate. If the debtor was a bidder a determination of which was the high bid should have been made. Moreover, IFR closed its bid at $1,775,000.00. It was permitted to privately encrease it to $1,825,000.00 which appears on the surface to exceed that proffered by the debtor. Over and above this such a classification of the Debtor in a Chapter XI proceeding is completely illogical. This debtor, as any publicly held corporation, has six divisions in its community of interests: the corporation and its controlling shareholders; 3000 public investors,

divorced from control; 2300 unsecured creditors, divorced from control; landlords with limited property control; secured creditors with limited property control and employees. This community of interest must share in its "pot" made up of: manufacturing rights — trade names, patents, copyrights, machinery and equipment; a listing on the Midwest Stock Exchange; an $11,000,000.00 tax loss carryover; leaseholds and mortgaged resources. Upon the institution of a Chapter XI proceeding three more parties join this community of interest and must share in this "pot." The Court funds; compensable comittees and counsel; Court appointed officers and their counsel (Receiver or Trustee). The assets of course do not increase.

We point out that unlike a Chapter X proceeding where: debtor, trustee, creditor or shareholder may promulgate a plan; in a Chapter XI proceeding only the corporation (which we treat as one with its controlling shareholder) may propose a plan. Thus from a technical point of view classifying the debtor as a "bidder" is illogical, since it owns more than the assets offered for sale in this proceeding and we believe would be prohibited from purchasing them to the detriment of its creditors. (This would be collusion.)

Chapter XI also precludes a modification of secured indebtedness or leaseholds (although it permits a rejection of leases). Yet, to believe that a debtor may solve its problems without dealing with these classes of claimants is unrealistic. Of what good to Webcor would a settlement with its unsecured creditors be if the leases it needs to operate are cancelled, of what good to Webcor is an arrangement if it loses its plant through foreclosure. In order then to promulgate a plan the debtor must undertake, outside of Court, the financial burden of settling its difference with those classes of liabilities not drawn into the Court's purview.

Indulging the Court's patience, let us contrast the undertakings of the plan to that of IFR. The debtor's undertakings—as evidenced by its plan and the practical promulgation thereof—was to settle its unsecured indebtedness in an amount satisfactory to its creditors (as shown by the complete accord of the receiver, his attorney and creditors); of necessity to cure its secured indebtedness problems and leasehold problems; to liquidate its obligation to the Court; the Court's officers; officially appointed creditors representatives; to provide working capital enabling it again to retain its employees and preserve to all of its shareholders a percentage of their equity interest. Its financial backers—all rehabilitation proceedings must have financial backing; this is recognized in Sec. 393 of the Bankruptcy Act. 11 U. S. C. Sec. 793—undertook not only to provide the funds for unsecured creditors but undertook all other financial and physical burdens commensurate with the plan offered.

To be sure the backers would receive control of the entire "pot" but to do so they assumed the entire burden. Against this IFR purchased the manufacturer rights (above defined) and its only burden is the payment of one set sum. IFR did not assume the burden of liquidating the unsecured creditors; of dealing with lessors or secured creditors; of liquidating obligations incurred by the Bankruptcy Act and finally the financial responsibility of "making the whole business go." The undertakings of both parties are so different that to classify the debtor and its backers as bidders in the same sense as the limited undertaking of IFR is to blink at reality and logic. Such a holding renders it virtually impossible for a publicly held debtor having various classes of creditors in a Chapter XI proceeding to ever promulgate a meaningful plan, even though all classes could be rapidly and economically dealt with in such a proceeding. Resort would have to be to the

longer circuitous route of a Chapter X where of necessity full hearings are permitted. Congress did not intend such a result.

5. PERMITTING A SALE TO BE CONFIRMED WHILE AN UNINVESTIGATED PLAN WAS ON FILE IS NOT CONSISTENT WITH THE BANKRUPTCY ACT'S INTENTION.

It must be borne in mind that before this sale was had or confirmed the court had entered an order of insolvency and the debtor filed all of its schedules; a plan of arrangement and a petition praying for relief pursuant to chapter XI, thus meeting all tests of 11 U. S. C. Sec. 723.

11 U. S. C. Sec. 721 (321 Bankruptcy Act) provides:

> "A debtor may file a petition under this Chapter in a pending bankruptcy proceeding either before or after adjudication."

The filing of a petition and plan was, we respectfully submit, the filing of a petition pursuant to Section 321 after adjudication. As stated in 8 COLLIERS ON BANKRUPTCY, 14th Ed. Sec. 4.15 p. 462 and 8 COLLIERS ON BANKRUPTCY, 14th Ed. Sec. 4.16(11) p. 471, while a petition filed after adjudication does not act as an automatic stay of administration, even if a stay is not granted, "No step in administration can be taken which is based on Chapter I through VII which is inconsistent with the provisions of Chapter XI". The sale of the debtor's major assets prohibiting rehabilitation under Chapters I through VII are inconsistent with the provisions of Chapter XI, 8 COLLIERS ON BANKRUPTCY, 14th ed. Sec. 4.16(11), p. 471. *Cf. In Re Pure Penn Petroleum*, 188 F. 2d 851 (2nd Cir. 1951). Therefore, a sale should not have been held. This is the logic of the statute yet the Court of Appeals, although this issue was raised, rendered no opinion concerning it.

Its failure to do so renders the provision of the statute

completely ineffectual for if the court may, despite the filing of a 321 petition, move to place the debtor in a position where an arrangement is impossible without a full investigation, it becomes pointless to file a 321 petition. Congress did not intend such a result.

Moreover, the Court of Appeals' position negates Congress' intention as interpreted by this court in providing a speedy remedy for a publicly held corporation. The Senate said in Senate Report No. 2094, 85th Congress, 2nd Session (1958):

> "When a petition must be speedily filed to hold off marshals and sheriff, pro forma compliance with the requirement is the inevitable result . . ."

Now the shield of Congress has been removed and once again a race with liquidation occurs—now under Court protection—a result which Congress specifically sought to avoid. This race is now permitted to continue without any inquiry into the plan's meaning or consequence. Placing the debtor in a competing position does violence to the Act under whch it seeks protection.

CONCLUSION.

This is a case of first impression. It is the first time liquidation has been ordered instead of rehabilitation when a meaningful plan of arrangement has been proffered without a finding that the plan is unfeasible or not in the best interests of creditors as a whole.

It is also the first case (no other reported cases have been found) since the availability of Chapter XI to a public corporaton that the Court has been called upon to exercise its powers to protect the entire corporate community—debtor and public shareholder—in their efforts at rehabilitation. The effect of this decision is to render the

speedy economical Chapter XI impotent to a publicly held corporation with a semi-complicated financial structure that needs time and careful study by the Court, creditors, shareholders and debtor to promulgate a meaningful plan. The sole criteria will be the expediency of a "bid in hand" regardless of the avoidability of the economic catastrophy to all connected with it. If the decision stands the rules worked out by Congress and the Supreme Court for the use of this section become meaningless and resort must be had to the long, expensive—but protected—procedure of Chapter X. In the future the time within which to file schedules and a plan required by this decision will plague publicly held corporations in their efforts to seek rehabilitation through Chapter XI. For these reasons, we respectfully submit, the Court should grant the writ.

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

Nos. 16572, 16573, 16574, 16575, 16576, 16577

IN THE MATTERS OF:

WEBCOR, INC., an Illinois corporation, et al., *Bankrupt*,

WEBCOR SALES COMPANY, a New Jersey Corporation, et al., *Bankrupt*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 7, 1968

Before KILEY, SWYGERT, and CUMMINGS, *Circuit Judges*.

SWYGERT, *Circuit Judge*. In these appeals, certain creditors and shareholders of Webcor, Incorporated and Webcor Sales Company, bankrupts,[1] primarily challenge orders of the Referee in Bankruptcy both refusing to set aside an order of adjudication and to reinstate Chapter XI proceedings and confirming the sale of the bankrupts' assets to International Fastener Research Corporation (hereafter I. F. R. C.).[2] The principal question posed by the appellants

1. Webcor, Incorporated owned all of the issued and outstanding shares of Webcor Sales Company. In these proceedings, the two companies have been treated as a single entity.

2. There are six appeals before the court comprised of two identical sets of three appeals from certain orders of the district court entered in the bankruptcy proceedings of Webcor Incorporated and Webcor Sales Company.

is whether the referee abused his discretion in proceeding to liquidate these corporations in bankruptcy rather than allowing them to attempt to effect a proposed plan of arrangement pursuant to Chapter XI. On the motion of the appellants, we granted an injunction *pendente lite,* restraining I. F. R. C. from in any way taking possession or disposing of the bankrupts' assets pending the outcome of these appeals. The bankrupts were granted leave to intervene and the hearing of the cases was expedited.

On July 5, 1967, Webcor, Incorporated and Webcor Sales Company filed petitions for an arrangement pursuant to Section 322 of Chapter XI of the Bankruptcy Act, 11 U. S. C. § 722. No plan accompanied the petitions. The following day a receiver was appointed to manage their property. On October 12, 1967, the referee entered an *ex parte* order directing the corporations to file a plan of arrangement by October 25, 1967 and setting a hearing for that date to consider whether to enter an order pursuant to Section 376(2) of the Bankruptcy Act, 11 U. S. C. 776(2), either adjudging them bankrupts or dismissing the Chapter XI proceedings. After notice to the parties, the receiver filed a petition with the referee on October 17, 1967 reciting an offer to purchase all of the corporations' assets for $1,030,000 and requesting a sale on return of bids. The referee entered an order on the same day authorizing solicitation of bids to be returned on November 6, 1967, fixing $1,030,000 as the upset price, and appointing appraisers.[3]

Because no plan of arrangement had been filed before the October 25 hearing, the referee entered orders adjudicating the corporations bankrupts on that date. Although the creditors' committee raised no objection to requests "to delay entering an order of adjudication until November

3. The appraisers valued the bankrupts' real and personal property at $1,081,422.33, filing their report on November 3, 1967.

6th" to give the corporations additional time to file a plan, the receiver's counsel informed the referee that their business had been closed for almost four months, that amounts in excess of $25,000 a month were being expended to preserve the assets of the estates, and that any delay might jeopardize the firm bid already received. At that time, the referee said: "I am going to enter an order of adjudication on the failure to present a plan, . . . And if between now and November the 6th a plan can be formulated that would deserve consideration, why we will consider it."

On November 2, 1967, the bankrupts filed a proposed plan of arrangement. The plan provided for full payment in cash of the costs of administration; full payment in cash of all claims and obligations incurred after July 5, 1967; full payment in cash of all claims entitled to priority under the Bankruptcy Act; full payment in cash of general unsecured claims in the amount of $100 or less; fifty per cent payment in cash of general unsecured claims in excess of $100 in six installments over a five-year period. All of the funds necessary to consummate the plan were to be provided by A. F. Dormeyer Corporation. In addition, the Dormeyer Corporation agreed to supply $750,000 in working capital and to issue 200,000 shares of its common stock to Webcor, Incorporated, receiving seventy-nine per cent of Webcor, Incorporated common stock in return.

On the morning of November 6, the bankrupts filed identhat morning, the bankrupts' counsel advised the referee ing the October 25 order of adjudication, reinstating the Chapter XI proceedings, and deferring "any action on any of the bids which may be made in the course of the hearing set for November 6, 1967." At the hearing on the motions that morning, the bankrupts' counsel advised the referee that he had discussed the proposed plan with the creditors' committee and suggested that any action on the bankrupts' motion be deferred "until the bids have been taken this

afternoon to see what the highest bid is that is made in this Court, . . .'' One of the counsel for the creditors' committee informed the referee that although there existed an ambiguity in the plan's language and a ''question of evidence of [Dormeyer's] ability to pay,'' the committee had no objection to delaying the consideration of the bankrupts' motions. The referee agreed to follow the suggestion, deferring any action on the motions until the completion of the bidding.

When the hearing reconvened on the afternoon of November 6, spirited bidding took place. I. F. R. C., the original bidder, registered the high bid of $1,775,000. One of the counsel for the creditors' committee, who stated that ''a representative group'' of the committee was present, requested a recess to consider the bid and the plan on file together with an apparent modification of the plan proposed by counsel for Dormeyer just prior to the close of bidding. Counsel for the bankrupts then elaborated with respect to the modification, representing that Dormeyer was prepared to make $1,800,000 available that afternoon or the next morning. Upon determining that the $1,800,000 was not a bid by Dormeyer, but rather represented funds to ''implement the plan,'' the referee suggested that counsel for the bankrupts, Dormeyer, and I. F. R. C. get together with the creditors' committee and the receiver to discuss these recent developments.

After a recess, the hearing reconvened. One of the counsel for the creditors reported to the referee that after talking to the various interests, ''we decided . . . to take a vote. . . . The vote was . . . by a majority, that we do business with a bidder under the bankruptcy sale, and that we reject all further dealings with the debtor under a plan.''[4] He also informed the referee that I. F. R. C.

4. It appears from the record that counsel for the bankrupts and Dormeyer in fact met with the committee.

had increased its bid to $1,825,000 and recommended acceptance. "On the recommendation of the creditors' committee," the referee accepted I .F. R. C.'s bid of $1,825,000. The following day, the referee entered two orders: one denying the motions of the bankrupts to vacate the order of adjudication and to reinstate the Chapter XI proceedings, the other approving and confirming the sale of the assets to I. F. R. C.

Petitions for review of these orders were filed by the appellants on November 15, 1967. On November 16, they applied to the referee for a suspension of his November 7 order confirming the sale until the petitions for review were disposed of. In an order entered the same day, the referee denied the application. On November 17, 1967, the appellants filed both a petition to review that order and a petition to stay the execution and enforcement of the November 7 orders.

Both the petitions for review and the petition to stay came before the district judge on November 20, 1967. After lengthy argument during which the bankrupts' counsel indicated that an amended plan was being prepared, the district judge denied both the petition to review the referee's order denying the application to suspend and the petition to stay the execution and enforcement of the November 7 orders.[5] With respect to the amended plan and the petitions to review the November 7 orders, the judge stated:

> The matters before me this morning for decision I will now decide, and then I will re-refer the matter to the Referee as to the petition that was brought in here this morning: First of all, the petitions to vacate and set aside various orders of the Referee, . . . are each

5. The order of the district court, denying the petition for a stay, is the subject of two identical appeals. Because the appellants' and the bankrupts' obtained a stay pursuant to orders of this court entered on December 4 and December 12, 1967, these appeals are now moot.

> and all denied. . . .[6] The Chapter 11 proceedings and the bankruptcy proceedings, including the petition of the parties for vacation of the order of adjudication and approval of a plan, as presented this morning, are hereby re-referred to the Referee with full authority to proceed under the provisions of the Chapter 11.

Two hearings were held before the referee, one on the afternoon of November 20 and the other on the following morning. During the course of the afternoon hearing, the amnded plan of arrangement was filed. During the hearing the next morning, the bankrupts filed an application to vacate and reconsider the orders of November 7 which was denied after a hearing.[7] On that afternoon, the parties again appeared before the district judge on a combined motion of the appellants to obtain the setting of a supersedeas bond and a stay of all proceedings for ten days. This motion was denied after a lengthy hearing. In closing, the district judge stated, "The Referee's orders of this morning are approved and confirmed."[8]

In support of their contention that the district court erred in affirming the referee's orders both refusing to vacate the order of adjudication and confirming the sale to I. F. R. C., the appellants primarily argue that the purpose of Chapter XI is to effect the rehabilitation of corpo-

6. This order of the district court, affirming the two orders of the referee entered on November 7 (denying the motion to vacate the order of adjudication and to reinstate Chapter XI and confirming the sale to I. F. R. C.) is also the subject of two identical appeals.

7. Between the time that the morning hearing before the Referee was completed and the time set for the commencement of the afternoon hearing before the district court, the receiver gave I. F. R. C. a bill of sale for the bankrupts' assets in return for the balance of the purchase price.

8. This order of the district court, affirming the referee's order denying the application to vacate and reconsider the orders of November 7, is the subject of the final two identical appeals.

rations experiencing financial difficulties rather than their liquidations. Thus they claim that the referee here abused his discretion in decreeing the death of a fifty-year old corporation employing hundreds of people.

Although we agree that Chapter XI provides a vehicle for rehabilitating financially ill corporations, that enactment by no means guarantees continued existence to every plagued corporation. As the Supreme Court stated in *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 618 (1965), "[I]t must be recognized that Chapters X and XI were not designed to prolong—*without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills.*"

We believe the corporations had ample time to file a plant (their failure to do so being attributable to their own dilatory tactics) and therefore the October 25 order adjudicating them bankrupts was proper. When the order was entered, three and one-half months had elapsed since the filing of the Chapter XI petitions. Despite the fact that these corporations were in all probability acutely aware of their financial difficulties prior to July 6, not until two months later did they file the requisite schedules and statements.[9] In addition, their *business had ceased to operate approximately two months prior to July 6 and the receiver was expending in excess of $25,000 monthly to preserve their assets. Faced with these facts and with a firm bid for the purchase of the corporations' assets. . . .*" *in hand, the referee followed a prudent course on October 12* when he required the corporations to file a plan by October 25.

9. Section 324(1) of the Bankruptcy Act, 11 U. S. C. § 724(1) provides that "the court may, on application by the debtor, grant for cause shown further time, [beyond the filing of the Chapter XI petition] not exceeding ten days for filing . . . the schedules. . . ." The referee was extremely patient with the corporations which appeared to be in no particular hurry to effect their own rehabilitation.

Like prudence dictated his orders of October 17 setting the date for the sale and appointing appraisers. No plan having been filed by October 25, the referee complied with the literal terms of section 376(2) of the Bankruptcy Act, 11 U. S. C. § 776(2), in adjudicating the corporations bankrupts:

> If . . . an arrangement is not proposed in the manner and within the time fixed by the court, . . . the court shall—(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, . . . adjudging the debtor a bankrupt. . . .

Since there was no petition for review of the order of adjudication, that order became final and nonappealable on November 4, ten days after entry, pursuant to section 39(3) of the Bankruptcy Act, 11 U. S. C. § 67(3). *In re Acme Furnace Fitting Co.*, 302 F. 2d 318 (7th Cir.), *cert. denied*, 371 U. S. 853 (1962). Thereafter any attempt to have this order vacated or set aside was addressed to the sound discretion of the referee. A motion to this effect, coupled with requests to reinstate Chapter XI and to stay the sale, was made by the bankrupts on November 6. Four days previously, a plan of arrangement had been filed. Pursuant to the suggestion of bankrupts' counsel, action on the motion was postponed until after the bidding to enable the creditors to compare the plan and the bid. On the recommendation of the creditors' committee, the referee accepted the bid, confirmed the sale, and denied the bankrupts' motion.

We note at the outset that a confirmed judicial sale, such as the one here, can be set aside on appeal only if the referee was guilty of an abuse of discretion. 4A Collier on Bankruptcy ¶ 70.98(17) (14th Ed. 1967). The appellants make no claim that the sale was not properly

conducted in every respect.[10] In order to support their assertion that the referee abused his discretion, they contend that a sale of all the corporations' assets in a Chapter XI proceeding can be sanctioned only in an emergency which they deny existed here. In addition, they contend that of the twenty-four members of the creditors' committee, only twelve were present at the November 6 hearing and that of those twelve, only a bare majority of seven voted to accept the bid rather than the plan.

In re Pure Penn Petroleum Co., Inc., 188 F. 2d 851 (2d Cir. 1951), is cited in support of the proposition that an "emergency" is a necessary prerequisite to a sale of all a corporation's assets in Chapter XI. Although the appellants correctly recite the holding of that case, the requirement there set forth is inapplicable to the instant situation in that the corporations here had previously been adjudicated bankrupts. Thus we need not concern ourselves with the problems that the Second Circuit sought to avoid in *Pure Penn*, "that a Chapter XI plan could bring about the same result as ordinary bankruptcy proceedings . . . minus the protective provisions which are part of the latter, especially as to a sale of all the assets." *In re Pure Penn Petroleum Co., Inc., supra* at 855. *Accord*, *In re Northern Illinois Development Corp.*, 324 F. 2d 104 (7th Cir. 1963), *cert. denied*, 376 U. S. 938 (1964).

There is likewise no merit to the appellants' other contention that the order confirming the sale was somehow vitiated by the referee's "reliance" on the recommendation of the creditors.[11] Although acceptance by a majority

10. See General Order 48(2).

11. The record indicates that counsel for the bankrupts and the proponent of the plan appeared before the creditors' committee on November 6, and therefore, we assume that they were aware of the committee's composition. However, they made no mention of this point to the referee when the hearing reconvened after the recess.

of the creditors is required prior to confirmation of an arrangement, there is no provision in the Bankruptcy Act dealing with ordinary bankruptcy liquidation which requires that a referee solicit, entertain, or follow creditors' recommendations or preferences. Since the price paid for the bankrupts' assets far exceeded their appraised value, we cannot substitute our judgment for that of the referee who, intimately familiar with the bankrupts' predicament, confirmed the sale.[12] *Cf. In re Marathon Foundry and Machine Co.*, 228 F. 2d 594, 598 (7th Cir. 1955), *cert. denied*, 350 U. S. 1014 (1956). If the referee had confirmed the sale without affording the proponents of the plan an opportunity to talk to the committee, we could not say that such action would have constituted an abuse of discretion. That the referee allowed such overtures and then purported to "follow" the committee's recommendation did not constitute an abuse of discretion either, but rather reflected a commendable effort on his part to afford the fullest opportunity to the competing interests to be heard.[13]

If parties are to be encouraged to bid at judicial sales, there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended. From a reading of the record, we are convinced that the proponents of the plan were, in effect, "competing bidders," both at the time of the sale and

12. We have yet to discover a convincing demonstration that the plan would have yielded substantially more for the creditors than the sale.

13. At the hearing on November 21, the referee stated:

> I had a right to depend upon and rely upon the representations made to me by counsel for the creditors' committee.
>
> This was not the sole determining factor in the acceptance or approval of this bid. If I had felt at the time that the bid was inadequate, the decision of the creditors' committee certainly would not be the final one. I extended to them on the same theory that the law functions an opportunity to express their views, to express their desire, and they did so.

thereafter. *Once the sale of the assets to I. F. R. C. was confirmed, the existence of fraud, mistake, or a like infirmity would be necessary to set that confirmed sale aside.* No allegations of such vitiating circumstances were made here. The bankrupts' amended plan filed on November 21 was merely a higher "bid," consideration of which was propery rejected by the referee. See 4A COLLIER ON BANKRUPTCY ¶ 70.98(17), at 1183-1193 (14th Ed. 1967). *Smith* v. *Juhan*, 311 F. 2d 670 (10th Cir. 1962). *In re Marathon Foundry and Machine Co.*, 239 F. 2d 122 (7th Cir. 1956), *cert. denied*, 353 U. S. 912 (1957).

After considering the appellants' contentions, we conclude that they are without substance. The referee acted well within his discretion in denying the application for reconsideration. Nor did the district court err on November 20 and 21 in approving the actions of the referee.

Our decision in this case on the merits necessarily reflects a denial of I. F. R. C.'s motion to dismiss these appeals. *In re Central Metallic Casket Co., Inc.*, 273 F. 2d 506 (7th Cir. 1960); *In re Tyne*, 261 F. 2d 249 (7th Cir.), *cert. denied*, 359 U. S. 974 (1959). *Cf. In re Drive-In Development Corp.*, 371 F. 2d 215 (7th Cir. 1966), *cert. denied*, 387 U. S. 909 (1967).

The orders appealed from are affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604.

Friday, January 12, 1968.

Before

Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Walter J. Cummings, Circuit Judge.

Nos. 16572, 16573, 16574, 16575, 16576, 16577.

In the Matter of:
Webcor, Inc., an Illinois corporation, et al.,
Bankrupt,

vs.

Webcor Sales Company, a New Jersey corporation, et al.,
Bankrupt.

The court has fully considered the briefs filed in these appeals and has heard oral arguments on the issues. Having reached its conclusion, the court now announces its decision and enters judgment in accordance with and for the reasons given in an opinion to be filed hereafter.

We are hereby disposing of six appeals, comprised of two identical sets of three appeals, from certain orders of the district court entered in two bankruptcy proceedings.

Two appeals are from "the order of the Honorable William Campbell, Judge . . . entered on November 20, 1967, denying certain petitions for review, from the orders entered by the Honorable Lawrence Miller, Referee in Bankruptcy, in the above-entitled cause."

On November 20, 1967, Judge Campbell, among other things denied "petitions to vacate and set aside various orders of the Referee" entered on November 7, 1967. One of the November 7, 1967 orders of the Referee denied the motion of Webcor, Inc. and Webcor Sales for "an order vacating the order of adjudication and reinstating the Chapter XI proceedings." The other November 7, 1967 order of the Referee "approved and confirmed" the sale of the assets of the bankrupts to International Fastener Research Corporation.

We affirm the order of Judge Campbell entered on November 20, 1967, with special reference to that portion of his order denying the petition to review the two orders of the Referee entered on November 7, 1967.

Two appeals are from "the order of the Honorable William Campbell, Judge . . . entered on November 20, 1967, denying petition to stay the execution and enforcement of orders of November 7, 1967."

These appeals are now moot.

Two "appeals" are from the "Order entered by the Honorable William J. Campbell, Judge . . . affirming the Order of Referee Lawrence J. Miller denying the Application to reconsider and vacate Orders dated November 7, 1967, said Application having been filed by the above captioned bankrupts, and said Order of Judge William J. Campbell having been entered on November 21, 1967."

The November 21, 1967 order of Judge Campbell here referred to was an oral order which "approved and confirmed" the Referee's oral "orders of this morning." No petition for review of the Referee's order of November 21, 1967, denying "the applications to reconsider and vacate the orders that I heretofore entered, and that have been affirmed by Judge Campbell, the orders of November 7," was before Judge Campbell on November 21, 1967. How-

ever, to fully dispose of the matters raised in these "appeals" we affirm Judge Campbell's actions on November 21, 1967 in these matters.

The order of this court on December 4, 1967, as modified by its order of December 12, 1967, is vacated insofar as said orders granted "the emergency motion to stay the Referee's order of sale dated November 7, 1967 in cause numbers 67-B-4934 and 67-B-4935 in the United States District Court for the Northern District of Illinois, Eastern Division."

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago, Illinois 60604.

Wednesday, March 27, 1968.

Before

Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

In the Matter of Webcor, Inc., et al., *Bankrupt,* No. 16572, 3, 4, 5, 6, 7 *vs.* Silver, Inc., et al., *Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604.

Wednesday, March 27, 1968.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge,
Hon. Walter J. Cummings, Circuit Judge.

In the Matter of Webcor, Inc., et al., *Bankrupt,* No. 16572, 3, 4, 5, 6, 7 *vs.* Silver, Inc., et al., *Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court, en banc, that the petition for rehearing en banc in this cause be and the same is hereby denied.

UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable William J. Campbell, Chief Judge.

Cause No. 67 B 4934 Date Nov. 20, 1967

Title of Cause In the matter of Webcor, Inc., Bankrupt.

Brief Statement of Motion

Petition to stay execution and enforcement of order of November 7, 1967.

Petition to stay execution and enforcement of orders of November 7, 1967, are denied. The petition to find the Chapter 10 herein as having been filed in good faith is denied and the Court finds that the said petition was not filed in good faith and accordingly same is dismissed.

The Chapter 11 proceedings & the bankruptcy proceedings, including the petition of the parties for vacation of the order of adjudication and approval of a plan are hereby re-referred to the Referee with full authority to proceed under provisions of Chapter 11.

UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable Campbell.

Cause No. 67 B 4934 and 67 B 4935 Date Nov. 21, 1967

Title of Cause Webcor, Inc., Bankrupt and Webcor Sales Company, Bankrupt.

Brief Statement of Motion
set supersedeas bond.

Names and Addresses of moving counsel

Leonard Gesas, Lawrence M. Cooper, Robert M. Woodward, I. Harvey Levinson and Melvin E. Levinson, 69 W. Washington, Chicago, Ill. 60602, 332-4070.

Representing petitioners.

Motion for supersedeas bond is denied. Motion for an injunction and setting of a bond in support is likewise denied. The Referee's orders of this morning are approved and confirmed.

(Causes Nos. 67 B 4934 & 67 B 4935)

ORDER.

This matter coming on to be heard this 25th day of October, 1967, upon the hearing of the first meeting of creditors under Chapter XI and upon the hearing set under Section 376(2) to consider the entry of an order either adjudicating the Debtor a bankrupt and directing that bankruptcy be proceeded with, or dismissing the proceedings under Chapter XI thereof, said hearing having been set before this Court for October 25, 1967, due notice in writing of said hearings having been given to all known creditors, and the Court having held said hearings and having heard the statements of counsel for parties in interest, made in open Court.

The Court finds that the Debtor filed its voluntary petition for arrangement under Chapter XI on to-wit: July 5, 1967, without a Plan; that on the Debtor's own motion a Receiver was appointed on July 6, 1967;

[96] The Court further finds that the business of the Debtor had been shut down by the Debtor approximately two months prior to July 5, 1967, and has continued to be closed during the receivership, except for the plastics division;

The Court further finds that the Debtor, the unofficial Creditors' Committee, the Receiver and his Counsel have met on many occasions for the purpose of working out a Plan of Arrangement, without success;

The Court further finds that the delay in the filing of a Plan of Arrangement, or in the alternative, the entering of an Order of Adjudication, is costing this estate in ex-

penses for maintenance of said plant, in excess of Twenty-Five Thousand Dollars ($25,000.00) per month;

The Court further finds that no Plan of Arrangement has been filed to date, and that it is in the best interests of the estate herein that a stand-by Trustee be appointed by reason of the possibility of a suitable Plan being presented before the return of bids is acted upon by this Court;

The Court further finds that no nomination for a stand-by Trustee was made by creditors in opposition to the designation of Frank M. Whiston, heretofore acting as Receiver herein, as stand-by Trustee.

[97] IT IS THEREFORE ORDERED that Webcor, Inc., Debtor herein, be and is hereby adjudged a bankrupt that bankruptcy be proceeded with under the provisions of the Bankruptcy Act.

IT IS FURTHER ORDERED that Frank M. Whiston be, and he is hereby appointed stand-by Trustee.

October 25, 1967

(Causes Nos. 67 B 4934 & 67 B 4935)

ORDER.

At Chicago, Illinois, in said
District and Division on
November 7, 1967.

This cause coming on to be heard upon the return of bids, pursuant to the order of this Court of October 17, 1967, and pursuant to the terms and conditions of sale and statement of assets, attached hereto and made a part hereof, and marked as Exhibit A for identification, read in open Court on November 6, 1967, at 2:15 P.M., prior to the taking of the bids, copies of which were distributed to persons in attendance in the courtroom, and the same being clarified in open court by counsel, and pursuant to notice to all creditors and the general public, said return of bids coming on for [119] hearing on November 6, 1967, before the Honorable Lawrence J. Miller, Referee in Bankrutpcy, said return of bids being for the property described in the statement of assets attached hereto and made a part hereof and as clarified in statements of counsel made prior to bidding at said hearing, specifically including but not limited to the announcement that certain property, as set forth in Exhibit B, attached hereto and made a part hereof, is contained upon the premises, allegedly under lease, and upon said property so enumerated, only the right, title and interest of Frank M. Whiston, Receiver and Standby Trustee is sold.

And by the direction of this Court, Frank M. Whiston, Receiver and Standby Trustee herein, having heretofore accepted a guaranteed bid of $1,030,000.00 together with

a security deposit, as an upset price but subject to further bidding at said return of bids, and upon said bidding in open Court, the highest and best bid, of a series of bids, was made by International Fastener Research Corp., (hereinafter referred to as IFR), in the sum of $1,825,000.00 and said amount being substantially in excess of the aforesaid upset price, as well as being substantially in excess of the appraisal herein, and said purchaser having deposited the sum of $550,000.00 with Frank M. Whiston, Receiver and Standby Trustee, as security, pursuant to the terms of sale.

[120] And the Court having received the report and recommendation of the Creditors' Committee, made by its counsel in open Court, whereby said Creditors' Committee urged and recommended the approval and acceptance of said bid.

Now, THEREFORE, IT IS HEREBY ORDERED that the sale of the assets, said assets being more particularly described in Exhibit C attached hereto, to IFR and/or its designated Nominee for the sum of One Million Eight Hundred Twenty-Five Thousand Dollars ($1,825,000.00) be and it hereby is approved and confirmed; and

IT IS FURTHER ORDERED that the Receiver, the debtors and the Trustee shall execute and deliver deeds, bills of sale, assignments and such other documents and instruments as may be required or necessary in order to fully and finally consummate said sale, and to effectively transfer, assign, convey and grant to IFR and/or its Nominee, title to the assets described in Exhibit C; and

IT IS FURTHER ORDERED that title to all of the assets of the debtors, tangible and intangible, except as specifically excluded or otherwise modified or excepted by the provisions of said bill of sale attached as Exhibit C hereto, shall be, and hereby is, vested in IFR and/or its Nominee, free and clear of all liens, charges, encumbrances, taxes and

adverse claims and demands, and all creditors of the debtors be and they are [121] hereby restrained and enjoined from interfering with the peaceful possession and the right, title and interest of IFR and/or its Nominee in the assets of the debtors which are the subject of this sale order; and

IT IS FURTHER ORDERED that IFR shall pay the full balance of the purchase price to the Receiver or to any successor Trustee in Bankrutpcy within one banking day after this order becomes final and non-appealable, and in the event that IFR shall fail to so pay in full the balance of the purchase price, and provided the Receiver, the debtors and any successor Trustee in Bankruptcy are not in default with respect to the obligations imposed upon them hereunder, then in that event all of the funds heretofore paid or deposited by IFR on account of the purchase price shall be forfeited by it and IFR shall have no further right, title, interest, lien, charge or encumbrance in or to or against any of the assets of the debtors or these debtor estates, except, however, said deposit shall not be forfeited unless and until demand is made for the balance of the purchase price at or after it is due, and said balance is not paid within 24 hours after receipt of said demand by IFR. In the event that this order does not become final on or before the eleventh day after its entry, then in that event IFR shall, in its sole option and discretion, be relieved from all of the provisions of this order and its bid shall be deemed rescinded and the Receiver or successor [122] Trustee shall immediately return to IFR, without charge, deduction or offset, all of the funds heretofore paid or deposited by it on account of said purchase price, and thereafter IFR shall have no right, title, interest, lien, charge or encumbrance in and to any of the assets of the debtors or the debtor estates, and the debtors, Receiver and successor Trustee shall have no claim, demand or cause of action against IFR.

Dated: November 7, 1967

(Causes Nos. 67 B 4934 & 67 B 4935)

ORDER.

At Chicago, Illinois, in said
District or Division on
November 7, 1967

This cause coming on to be heard upon the motion of the Debtor in the prior proceedings for an arrangement, said motion bearing the caption of Webcor Sales Company, to vacate the order of adjudication entered herein on October 25, 1967, and for an order reinstating the arrangement proceeding heretofore filed on July 5 and to defer any action on bids returnable on November 6, 1967, at 2:00 P.M., said Debtor's motion being likewise noticed for the same day at 10:00 A.M.; [115] that a copy of the aforesaid plan of arrangement was attached to the said notice and motion of the Debtor to vacate the order of adjudication; said plan of arrangement proposed by the Debtor, bearing the caption of In the Matter of Webcor, Inc., No. 67 B 4934 and Webcor Sales Company, No. 67 B 4935, was filed herein on November 2, 1967, without prior leave of Court, and the aforesaid motion having been continued to 2:00 P.M. of November 6, 1967, after the return of bids, at the suggestion of counsel for the Debtor;

And the Court having held the return of bids, pursuant to prior order of this Court, with notice to all creditors and the public, well advertised at considerable expense, after having received a guaranteed bid for the purchase of the assets therein set forth, and after a series of higher bids, having obtained a high bid of $1,775,000.00, the Court declared a recess for the purpose of receiving the recommendations and guidance of the Creditors' Committee

herein, representing creditors totalling $1,500,000.00; that said Creditors' Committee was directed to promptly convene and to consider the acceptance or rejection of the highest bid, with counsel for the Debtor present, and the Receiver and his counsel present; that [116] during the course of the bidding counsel for A. F. Dormeyer Corp. requested permission to talk about the proposed plan, but was told by the Court the hearing was on bids, and after the highest bid was received and the bidding concluded, pending the deliveration and recommendation of the Committee, said counsel for A. F. Dormeyer Corp. stated he would obtain the sum of $1,800,000.00, not for a bid, but for a plan.

That upon the completion of the deliberations of the Creditors' Committee, its counsel thereupon stated to the Court that it had heard all parties, including the highest bidder, International Fastener Research Corp., requested said bidder to increase his bid to $1,825,000.00, which was acceptable, and the said Committe did thereupon recommend to the Court that said sum of $1,825,000.00 be approved by the Court. and that the proposed plan was not acceptable, and that tne motion relating thereto be denied.

And the Court having considered the proceedings of record herein prior to the date of the entry of an order of adjudication, and having considered the excellent results of the bidding, substantially in excess of the appraisal, and especially considering the diligent efforts of the Committe, its report and recommendation as set [117] forth hereinabove,

IT IS HEREBY ORDERED that the motion, supported by the applications of Webcor, Inc. and Webcor Sales Company. Debtors in the proceedings for arrangement prior to the order of adjudication herein, for the entry of an order vacating the order of adjudication and reinstating the Chapter XI proceedings, be and the same is hereby denied.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 22 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 226

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

v.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS INTERNATIONAL FASTENER RESEARCH CORPORATION and DYNAMICS CORPORATION OF AMERICA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

v.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS INTERNATIONAL FASTENER RESEARCH CORPORATION and DYNAMICS CORPORATION OF AMERICA

This Brief in opposition to the petition of certain stockholders and alleged creditors of two bankrupts for a writ of certiorari is submitted on behalf of the purchasers at a judicial sale which is sought to be undone. Also named as respondents are the two bankrupts most of whose assets were sold at the judicial sale.

INTRODUCTION

The Petition for Writ of Certiorari seeks review by this Court of the Order of the United States Court of Appeals for the Seventh Circuit entered on January 12, 1968. The opinion of the Court of Appeals is reported at 392 F. 2d 893 and is reprinted in Appendix A hereto because the opinion as appended to petitioners' brief contains typographical errors and substantial omissions. The judgment and opinion of the Court of Appeals determined six separate appeals from three separate orders affecting in identical fashion the bankrupt Webcor, Inc., and its subsidiary, the bankrupt Webcor Sales Company. The orders affirmed were:

1. The order of the District Court affirming on review the order of the Referee in Bankruptcy of November 7, 1967, approving and confirming a sale of the bankrupts' assets.

2. The order of the District Court affirming on review the order of the Referee in Bankruptcy dated November 7, 1967, denying the motion of the bankrupts to vacate the order of adjudication.

3. The order of the District Court entered November 21, 1967, affirming on review the order of the Referee in Bankruptcy announced November 21, 1967, denying a motion by the bankrupts to reconsider and vacate the Referee's order of November 7, which denied the motion of the bankrupts to vacate the order of adjudication.

COUNTERSTATEMENT OF THE CASE

The Trustee in Bankruptcy sold all of the assets of the bankrupt corporations at public auction after appro-

priate notice to creditors and others for a price far in excess of the court appraisal. The sale was recommended by the Official Creditors Committee. The Referee in Bankruptcy approved and confirmed the sale, and the bankrupts did not petition to review the order confirming sale. Certain stockholders and individual creditors of the bankrupts did petition to review the Referee's order and the District Court affirmed the Referee. The Court of Appeals then affirmed the orders of the District Court and of the Referee. During the pendency of the appeal, the appellants obtained a writ of supersedeas and a stay order which prevented the purchasers from obtaining possession and use of the assets. The Court of Appeals order of January 12, 1968, affirming the order of sale, vacated the supersedeas and the stay order. The petitioners did not attempt to obtain a further supersedeas or stay, and the purchasers took possession of the assets. The assets have been subsequently resold to various third parties or integrated into the purchasers' businesses and it is now impossible to restore the bankrupts to the status quo prevailing on the date of the Trustee's sale of the assets.

The judgment of the Court of Appeals also affirmed orders denying motions of the bankrupts to reconsider and to vacate final orders of the Referee adjudicating the debtors bankrupt.

The proceedings began July 5, 1967, with the filing by Webcor, Inc., and its wholly owned subsidiary of petitions for arrangement under the provisions of Chapter XI of the Bankruptcy Act. 11. U. S. C. § 722, 52 Stat. 907 (1938). The events which led up to the sale and the procedures followed below are fully and fairly stated by Judge Swygert in the Opinion of the Court of Appeals, Appendix A hereto. A further statement is not necessary except to note:

1. The repeated references in the Petition to the bankrupts as debtors and to the necessity for compliance with Chapter XI procedures distort the record. Rather, Webcor, Inc., and Webcor Sales Company had been adjudicated bankrupts and all of the proceedings and orders which were the subject of the appeals occurred and were entered after adjudication, in strict compliance with all applicable provisions of the Bankruptcy Act. It must also be mentioned that no one, not these petitioners nor anyone else, sought review of that order of adjudication.

2. At the judicial sale, although not required, all parties, including the bankrupts, were afforded the widest latitude in stating their views and offering potential solutions. Indeed, Judge Swygert noted the "commendable effort on [the Referee's] part to afford the fullest opportunity to the competing interests to be heard".

3. The statement that approval of the sale was based solely on the recommendations of the Creditors Committee is untrue and directly contrary to the findings of the Referee, the District Court and the Court of Appeals.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Petition herein does not present any question which is sufficiently special or important to warrant review by this Court. The only questions presented are:

1. Did the Referee in Bankruptcy act within his discretion in refusing to vacate an order adjudicating the debtors bankrupt?

2. Having adjudicated the debtors as bankrupt, having sent out notices of a judicial sale, having received bids of undeniably bona fide purchasers, may the Referee in Bankruptcy acting in his discretion confirm the sale to the highest bidder at a price $700,000 in excess of the independently assessed value of the property?

3. In the absence of fraud, or other circumstances indicating overreaching by the purchasers, may the Referee refuse to set aside his order confirming the sale?

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A JUDGMENT BASED ON CONSISTENT APPLICATION OF CORRECT PRINCIPLES OF LAW.

This case does not involve rules of law concerning which there is any conflict among the Courts of Appeals or between the decision below and applicable decisions of this Court. The Court of Appeals decision does not rest upon any unsettled questions of federal law. Rather, this case concerns the application of judicial discretion under well-settled principles of bankruptcy law.

A. Affirmance of the Denial of Rehearing of the Order of Adjudication was Proper.

On October 12, 1967, more than three months after the commencement of the arrangement proceedings, the Referee in Bankruptcy ordered the debtors to file any proposed plans of arrangement by October 25, 1967, and ordered a hearing for that date, upon notice to the debtors and creditors, to consider adjudication if the plans were not timely

filed. There were no objections to the order of October 12 and it became final on October 22, 1967. No plans of arrangement were filed by the debtors as required; accordingly, an order adjudging the debtors bankrupt was entered on October 25, 1967. None of the parties to the proceedings petitioned to review that order and it became final on November 6, 1967. Rather, on November 6, 1967, the bankrupts filed a motion before the Referee to reconsider the order of adjudication. After hearing argument, the Referee denied that motion.

Thus, Webcor, Inc., and Webcor Sales Company must be treated as bankrupts. The Referee's willingness thereafter to give consideration to a subsequently filed purported plan was only a matter of grace within his equitable discretion. Properly he considered it only as a circumstance bearing upon the exercise of his discretionary power to set aside the valid and final order of adjudication.

Petitioners' Point 1 rests upon the proposition that in Chapter XI cases this Court has held that "before liquidation could be ordered and efforts to rehabilitate called to a halt, the court had to make a determination that there was no possibility of rehabilitation and the financial life of the debtor was terminal", citing *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 618 (1965). Petition at 24. However, the sale of assets in this case took place in bankruptcy and not under Chapter XI, as the Court of Appeals recognized. The proceedings below were held pursuant to 11 U. S. C. § 776 which specifically provides that, in cases where an arrangement has not been proposed within the time fixed by the court, the court may adjudicate the debtor a bankrupt and direct that proceedings in bankruptcy take place. *American Trailer*, on the other hand, was a proceeding conducted pursuant to Chapter XI. There had not been an adjudication of bankruptcy and the question

presented to this Court was whether the proceeding should more properly have been conducted under Chapter X, as the more appropriate chapter for the reorganization of a publicly held corporation.

Equally inapposite are *General Stores Corp.* v. *Shlensky,* 350 U. S. 462 (1956); *In re Riddlesburg Mining Co.,* 224 F. 2d 834 (3d Cir. 1955); and *John Hancock Mut. Life Ins. Co.* v. *Casey,* 141 F. 2d 104 (1st Cir.), *cert. denied,* 323 U. S. 713 (1944). The latter two cases were cited at page 24 of the Petition for the proposition that in every case where there had been an adjudication there had been a finding that rehabilitation was impossible. But the courts in those two cases did not have occasion to consider that question. The Bankruptcy Act, while providing certain criteria for liquidations and sales of assets, contains no such requirement.

Section 376 of the Bankruptcy Act, 11 U. S. C. § 776, as amended in 1952, specifically provides that petitions for an arrangement *shall* be dismissed in certain specific eventualities: (a) if the schedules and statement of affairs are not duly filed (they were filed in this case, if quite late); (b) if an arrangement is not proposed in the manner and within the time fixed by the Court (the Court here fixed the time and manner and a plan was not filed); (c) if an arrangement is withdrawn or abandoned prior to its acceptance (it was not even filed in this case); (d) if it is not accepted at the meeting of creditors called to consider it (the Creditors Committee specifically recommended that bankruptcy be proceeded with and the assets sold) or (e) if the money or other consideration required to be deposited is not deposited (no deposit was suggested before adjudication; the deposit volunteered by petitioners was not made until after entry of the orders complained of). Thus, the Referee was under a statutory requirement to order adjudi-

cation; as a matter of grace only, he permitted petitioners the widest latitude to propose a possible plan.

In any event, an order denying a motion to vacate an order of adjudication is not appealable. *Metal Fabricators, Inc.* v. *Granite City Steel Co.,* 357 F. 2d 175 (8th Cir. 1966); *Hoover* v. *Hockenberry,* 100 F. 2d 87 (3d Cir. 1938). Motions to vacate orders, motions for rehearing and like motions are addressed to the discretion of the trial court and orders granting or denying such motions are not appealable. *Conboy* v. *First National Bank,* 203 U. S. 141, 145 (1906); *In re L. F. Grammes & Sons, Inc.,* 324 F. 2d 675 (3d Cir. 1963); *In re Marachowsky Stores Co.,* 188 F. 2d 686 (7th Cir. 1951).

B. Affirmance of the Referee's Order of Confirmation Was Proper Because the Referee Acted Within His Discretion in Confirming the Sale.

The general principles which govern the exercise of discretion in rejecting or confirming a sale to the highest bidder at a public sale are well settled. The decision of the Referee in Bankruptcy is reversible only if an abuse of discretion is shown. That discretion is necessarily wide because of the administrative nature of bankruptcy proceedings and its close contact with the commercial world. When that discretion has been specifically concurred in by the District Judge and the Court of Appeals, the administration of the bankruptcy laws requires that the sale not be upset. *See* 4A COLLIER, BANKRUPTCY 1181-82 (14th ed. 1967).

The theory of the courts has been that judicial sales, fairly and lawfully conducted, must be confirmed in order to insure the stability of such sales and, thus, to stimulate participation in them. *See Pewabic Mining Co.* v. *Mason,* 145 U. S. 349 (1892). As the Third Circuit long ago said in *Jacobsohn* v. *Larkey,* 245 F. 538, 541 (3d Cir. 1917):

> "Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires stability in such sales. The Ruby (D. C.) 38 Fed. 622; In re Burr, 217 Fed. 16, 19, 133 C. C. A. 126. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final, Tewabic [sic] Mining Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 36 L. Ed. 732; they are not to be disturbed except for substantial reasons."

The Courts of Appeals have continued the *Pewabic-Jacobsohn* rationale. In *Currin* v. *Nourse,* 66 F. 2d 137, 140 (8th Cir. 1933), the court, after quoting with approval the opinion in *Jacobsohn,* stated:

> "An appellate tribunal is precluded from revising the exercise of discretion in setting aside a judicial sale by a court having equitable jurisdiction, unless there is an abuse of power, or the case is in other respects extreme. In re Shea (C. C. A. 1) 126 F. 153, 156; In re Wolke Lead Batteries Co. (C. C. A. 6) 294 F. 509, 511; Century Motor Truck Co. v. Noyes (C. C. A. 1) 18 F. (2d) 546, 547. The same rule would apply to the proper exercise of discretion in confirming a sale."

As the Fifth Circuit wrote in *St. Regis Paper Co.* v. *Jackson,* 369 F. 2d 136, 142 (5th Cir. 1966):

> "The finality of these orders and transactions has a commercial value. For example, the more certain it is that a sale yields unimpeachable title the higher the price will be. A buyer will pay more for an object than he will for a lawsuit over that object."

The line of cases has come down to the present day and is concurred in by each of those Courts of Appeals which have had occasion to consider the problem. *E. g., Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 843 (2d Cir. 1946), *cert. denied,* 331 U. S. 818 (1947); *In re Stanley Engineering Corp.*, 164 F. 2d 316, 319 (3d Cir. 1947), *cert. denied,* 332 U. S. 847 (1948); *In re Marathon Foundry & Machine Co.*, 228 F. 2d 594 (7th Cir. 1955), *cert. denied,* 350 U. S. 1014 (1956).

The citation by petitioners of *In re Pure Penn Petroleum Co.*, 188 F. 2d 851 (2d Cir. 1951), is not applicable to the facts of this case. There the Court of Appeals reversed the Referee's order of sale and remanded, not because an order of adjudication had been improvidently entered, but because the court had failed to enter an order of adjudication and, therefore, had failed to provide for the protective devices which surround a bankruptcy sale including a public auction, advertising, court appraisals, and negotiations and a sale by a trustee or a receiver. In the case now before this Court, each of the safeguards found missing in *Pure Penn* is present and, instead of the assets having been sold for approximately 6% of their value, the assets have been sold to Respondents for over $700,000 more than their appraised value.

Petitioners' Point 2 rests on the proposition that the Referee abdicated his judicial responsibility by basing his rejection of the plan solely upon the recommendation of the Creditors Committee. Whatever may be the merits of the legal proposition that the Referee must act independently of such a Creditors Committee, each of the courts below has found that the Referee did so act. *See infra* at 11a, n. 13. The fact is that the Referee acted independently, noting that the Committee apparently agreed

with him. Further, whatever were the views of the various individual members of the Committee present at the sale, the full Committee the previous business day had voted unanimously not to approve any plan of arrangement which did not have an immediate cash deposit, and there was no such immediate cash deposit.

C. Affirmance of Denial of Reconsideration of Order Confirming the Sale was Proper, No Fraud or Any Other Overreaching During the Sale Having Been Asserted.

This case presented the Court of Appeals with two separate legal standards to be applied to the same fact situation. (a) On appeal, an order confirming sale may be reversed for abuse of discretion. (b) An order confirming sale may be set aside by the Referee only if there is fraud or overreaching. Thus, the Court of Appeals found no abuse of discretion and held that the Referee properly confirmed the sale. It further found that there was no allegation of fraud or overreaching and held that the Referee properly denied the motion to set aside the sale. Petitioners have continuously confused those two concepts and holdings. Thus, the somewhat shrill complaint of the petitioners that the decision below is in conflict with every other Court of Appeals decision on the subject is inaccurate and represents a confusion of those two holdings.

Further, the reliance of petitioners on *In re Solar Mfg. Corp.*, 176 F. 2d 493 (3d Cir. 1949), is misplaced. *Solar* involved a private sale of assets in a Chapter X proceeding at a price far below the indicated or appraised value. The sale was set aside because it had not been surrounded by the safeguards of a public sale and an appraisal, both of which safeguards were observed in this case.

II.

THERE IS NO PRACTICAL OCCASION OR REASON FOR REVIEW OF THIS CASE BY THIS COURT.

The sale challenged by petitioners was confirmed on November 7, 1967, and possession of the assets sold was finally taken after all court stays had been removed on January 12, 1968. The physical assets have been removed from the bankrupts' leasehold and disposed of by the purchasers. Petitioners did not seek any expedition of the rehearing by the Court of Appeals or of the petition for certiorari. Rather, after receiving one extension, they permitted the mandate of the Court of Appeals to be issued and waited until almost the last day to file this petition for a writ of certiorari.

Even if certiorari should be granted and the case remanded to the Bankruptcy Court for further proceedings, the physical assets could not be restored to their former state. Most of the tangible assets have been sold to third parties or mingled with other assets of the purchasers. Even in the case of intangibles such as the trade names which were transferred, the uncertainty which would be created would in all likelihood permanently destroy the value of the goodwill attached to the names and marks.

CONCLUSION

This case received the most careful consideration by three courts below, the Referee in Bankruptcy, the District Court and the Court of Appeals. It does not present any novel questions, but merely the application of well-settled principles of law to a particular fact situation. As the Court of Appeals noted, the Referee acted prudently and discreetly.

Further, this Court, in order to upset the sale, would have to undermine important interests which have vested in the purchasers, commercial entities who responded to the solicitation of the Trustee for bids. Judicial sales must be recognized as final and certain, if they are to perform their function as the best method of getting the highest price for assets to be sold.

This petition for a writ of certiorari should be denied.

July 22, 1968

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968
Nos. 16572, 16573, 16574, 16575, 16576, 16577

IN THE MATTERS OF:
WEBCOR, INC., an Illinois corporation, et al.,
Bankrupt,
WEBCOR SALES COMPANY, a New Jersey corporation, et al.,
Bankrupt.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 7, 1968

Before KILEY, SWYGERT, and CUMMINGS, *Circuit Judges.*

SWYGERT, *Circuit Judge.* In these appeals, certain creditors and shareholders of Webcor, Incorporated and Webor Sales Company, bankrupts,[1] primarily challenge orders of the Referee in Bankruptcy both refusing to set aside an order of adjudication and to reinstate Chapter XI proceedings and confirming the sale of the bankrupts' assets to International Fastener Research Corporation

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[1]Webcor, Incorporated owned all of the issued and outstanding shares of Webcor Sales Company. In these proceedings, the two companies have been treated as a single entity.

(hereafter I.F.R.C.).[2] The principal question posed by the appellants is whether the referee abused his discretion in proceeding to liquidate these corporations in bankruptcy rather than allowing them to attempt to effect a proposed plan of arrangement pursuant to Chapter XI. On the motion of the appellants, we granted an injunction *pendente lite,* restraining I.F.R.C. from in any way taking possession or disposing of the bankrupts' assets pending the outcome of these appeals. The bankrupts were granted leave to intervene and the hearing of the cases was expedited.

On July 5, 1967, Webcor, Incorporated and Webcor Sales Company filed petitions for an arrangement pursuant to Section 322 of Chapter XI of the Bankruptcy Act, 11 U. S. C. § 722. No plan accompanied the petitions. The following day a receiver was appointed to manage their property. On October 12, 1967, the referee entered an *ex parte* order directing the corporations to file a plan of arrangement by October 25, 1967 and setting a hearing for that date to consider whether to enter an order pursuant to Section 376(2) of the Bankruptcy Act, 11 U.S.C. § 776(2), either adjudging them bankrupts or dismissing the Chapter XI proceedings. After notice to the parties, the receiver filed a petition with the referee on October 17, 1967 reciting an offer to purchase all of the corporations' assets for $1,030,000 and requesting a sale on return of bids. The referee entered an order on the same day authorizing solicitation of bids to be returned on November 6, 1967, fixing $1,030,000 as the upset price, and appointing appraisers.[3]

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[2]There are six appeals before the court comprised of two identical sets of three appeals from certain orders of the district court entered in the bankruptcy proceedings of Webcor Incorporated and Webcor Sales Company.

[3]The appraisers valued the bankrupts' real and personal property at $1,081,422.33, filing their report on November 3, 1967.

Because no plan of arrangement had been filed before the October 25 hearing, the referee entered orders adjudicating the corporations bankrupts on that date. Although the creditors' committee raised no objection to requests "to delay entering an order of adjudication until November 6th" to give the corporations additional time to file a plan, the receiver's counsel informed the referee that their business had been closed for almost four months, that amounts in excess of $25,000 a month were being expended to preserve the assets of the estates, and that any delay might jeopardize the firm bid already received. At that time, the referee said: "I am going to enter an order of adjudication on the failure to present a plan, . . . And if between now and November the 6th a plan can be formulated that would deserve consideration, why we will consider it."

On November 2, 1967, the bankrupts filed a proposed plan of arrangement. The plan provided for full payment in cash of the costs of administration; full payment in cash of all claims and obligations incurred after July 5, 1967; full payment in cash of all claims entitled to priority under the Bankruptcy Act; full payment in cash of general unsecured claims in the amount of $100 or less; fifty per cent payment in cash of general unsecured claims in excess of $100 in six installments over a five-year period. All of the funds necessary to consummate the plan were to be provided by A. F. Dormeyer Corporation. In addition, the Dormeyer Corporation agreed to supply $750,000 in working capital and to issue 200,000 shares of its common stock to Webcor, Incorporated, receiving seventy-nine per cent of Webcor, Incorporated common stock in return.

On the morning of November 6, the bankrupts filed identical motions with the referee, praying for an order

vacating the October 25 order of adjudication, reinstating the Chapter XI proceedings, and deferring "any action on any of the bids which may be made in the course of the hearing set for November 6, 1967." At the hearing on the motions that morning, the bankrupts' counsel advised the referee that he had discussed the proposed plan with the creditors' committee and suggested that any action on the bankrupts' motions be deferred "until the bids have been taken this afternoon to see what the highest bid is that is made in this Court, . . .". One of the counsel for the creditors' committee informed the referee that although there existed an ambiguity in the plan's language and a "question of evidence of [Dormeyer's] ability to pay," the committee had no objection to delaying the consideration of the bankrupts' motions. The referee agreed to follow the suggestion, deferring any action on the motions until the completion of the bidding.

When the hearing reconvened on the afternoon of November 6, spirited bidding took place. I.F.R.C., the original bidder, registered the high bid of $1,775,000. One of the counsel for the creditors' committee, who stated that "a representative group" of the committee was present, requested a recess to consider the bid and the plan on file together with an apparent modification of the plan proposed by counsel for Dormeyer just prior to the close of bidding. Counsel for the bankrupts then elaborated with respect to the modification, representing that Dormeyer was prepared to make $1,800,000 available that afternoon or the next morning. Upon determining that the $1,800,000 was not a bid by Dormeyer, but rather represented funds to "implement the plan," the referee suggested that counsel for the bankrupts, Dormeyer, and I.F.R.C. get together with the creditors' committee and the receiver to discuss these recent developments.

After a recess, the hearing reconvened. One of the counsel for the creditors reported to the referee that after talking to the various interests, "we decided . . . to take a vote. . . . The vote was . . . by a majority, that we do business with a bidder under the bankruptcy sale, and that we reject all further dealings with the debtor under a plan."[4] He also informed the referee that I.F.R.C. had increased its bid to $1,825,000 and recommended acceptance. "On the recommendation of the creditors' committee," the referee accepted I.F.R.C.'s bid of $1,825,000. The following day, the referee entered two orders: one denying the motions of the bankrupts to vacate the order of adjudication and to reinstate the Chapter XI proceedings, the other approving and confirming the sale of the assets to I.F.R.C.

Petitions for review of these orders were filed by the appellants on November 15, 1967. On November 16, they applied to the referee for a suspension of his November 7 order confirming the sale until the petitions for review were disposed of. In an order entered the same day, the referee denied the application. On November 17, 1967, the appellants filed both a petition to review that order and a petition to stay the execution and enforcement of the November 7 orders.

Both the petitions for review and the petition to stay came before the district judge on November 20, 1967. After lengthy argument during which the bankrupts' counsel indicated that an amended plan was being prepared, the district judge denied both the petition to review the referee's order denying the application to suspend and the petition to stay the execution and enforcement of the November 7

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[4]It appears from the record that counsel for the bankrupts and Dormeyer in fact met with the committee.

orders.[5] With respect to the amended plan and the petitions to review the November 7 orders, the judge stated:

> The matters before me this morning for decision I will now decide, and then I will re-refer the matter to the Referee as to the petition that was brought in here this morning: First of all, the petitions to vacate and set aside various orders of the Referee, . . . are each and all denied. . . .[6] The Chapter 11 proceedings and the bankruptcy proceedings, including the petition of the parties for vacation of the order of adjudication and approval of a plan, as presented this morning, are hereby re-referred to the Referee with full authority to proceed under the provisions of the Chapter 11.

Two hearings were held before the referee, one on the afternoon of November 20 and the other on the following morning. During the course of the afternoon hearing, the amended plan of arrangement was filed. During the hearing the next morning, the bankrupts filed an application to vacate and reconsider the orders of November 7 which was denied after a hearing.[7] On that afternoon, the parties again appeared before the district judge on a combined motion of the appellants to obtain the setting of a supersedeas bond and a stay of all proceedings for

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[5]The order of the district court, denying the petition for a stay, is the subject of two identical appeals. Because the appellants' and the bankrupts' obtained a stay pursuant to orders of this court entered on December 4 and December 12, 1967, these appeals are now moot.

[6]This order of the district court, affirming the two orders of the referee entered on November 7 (denying the motion to vacate the order of adjudication and to reinstate Chapter XI and confirming the sale to I.F.R.C.) is also the subject of two identical appeals.

[7]Between the time that the morning hearing before the Referee was completed and the time set for the commencement of the afternoon hearing before the district court, the receiver gave I.F.R.C. a bill of sale for the bankrupts' assets in return for the balance of the purchase price.

ten days. This motion was denied after a lengthy hearing. In closing, the district judge stated, "The Referee's orders of this morning are approved and confirmed."[8]

In support of their contention that the district court erred in affirming the referee's orders both refusing to vacate the order of adjudication and confirming the sale to I.F.R.C., the appellants primarily argue that the purpose of Chapter XI is to effect the rehabilitation of corporations experiencing financial difficulties rather than their liquidation. Thus they claim that the referee here abused his discretion in decreeing the death of a fifty-year old corporation employing hundreds of people.

Although we agree that Chapter XI provides a vehicle for rehabilitating financially ill corporations, that enactment by no means guarantees continued existence to every plagued corporation. As the Supreme Court stated in *SEC* v. *American Trailer Rentals Co.*, 379 U.S. 594, 618 (1965), "[I]t must be recognized that Chapters X and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills."

We believe the corporations had ample time to file a plan (their failure to do so being attributable to their own dilatory tactics) and therefore the October 25 order adjudicating them bankrupts was proper. When the order was entered, three and one-half months had elapsed since the filing of the Chapter XI petitions. Despite the fact that these corporations were in all probability acutely aware of their financial difficulties prior to July 6, not until two months later did they file the requisite schedules

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[8]This order of the district court, affirming the referee's order denying the application to vacate and reconsider the orders of November 7, is the subject of the final two identical appeals.

and statements.[9] In addition, their business had ceased to operate approximately two months prior to July 6 and the receiver was expending in excess of $25,000 monthly to preserve their assets. Faced with these facts and with a firm bid for the purchase of the corporations' assets in hand, the referee followed a prudent course on October 12 when he required the corporations to file a plan by October 25. Like prudence dictated his orders of October 17 setting the date for the sale and appointing appraisers. No plan having been filed by October 25, the referee complied with the literal terms of section 376(2) of the Bankruptcy Act, 11 U. S. C. § 776(2), in adjudicating the corporations bankrupts:

> If . . . an arrangement is not proposed in the manner and within the time fixed by the court, . . . the court shall—(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, . . . adjudging the debtor a bankrupt. . . .

Since there was no petition for review of the order of adjudication, that order became final and nonappealable on November 4, ten days after entry, pursuant to section 39(3) of the Bankruptcy Act, 11 U. S. C. § 67(3). *In re Acme Furnace Fitting Co.*, 302 F.2d 318 (7th Cir.), *cert. denied*, 371 U. S. 853 (1962). Thereafter any attempt to have this order vacated or set aside was addressed to the sound discretion of the referee. A motion to this

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[9] Section 324(1) of the Bankruptcy Act, 11 U. S. C. § 724(1) provides that "the court may, on application by the debtor, grant for cause shown further time, [beyond the filing of the Chapter XI petition] not exceeding ten days for filing . . . the schedules. . . ." The referee was extremely patient with the corporations which appeared to be in no particular hurry to effect their own rehabilitation.

effect, coupled with requests to reinstate Chapter XI and to stay the sale, was made by the bankrupts on November 6. Four days previously, a plan of arrangement had been filed. Pursuant to the suggestion of bankrupts' counsel, action on the motion was postponed until after the bidding to enable the creditors to compare the plan and the bid. On the recommendation of the creditors' committee, the referee accepted the bid, confirmed the sale, and denied the bankrupts' motion.

We note at the outset that a confirmed judicial sale, such as the one here, can be set aside on appeal only if the referee was guilty of an abuse of discretion. 4A COLLIER ON BANKRUPTCY ¶ 70.98(17) (14th Ed. 1967). The appellants make no claim that the sale was not properly conducted in every respect.[10] In order to support their assertion that the referee abused his discretion, they contend that a sale of all the corporations' assets in a Chapter XI proceeding can be sanctioned only in an emergency which they deny existed here. In addition, they contend that of the twenty-four members of the creditors' committee, only twelve were present at the November 6 hearing and that of those twelve, only a bare majority of seven voted to accept the bid rather than the plan.

In re Pure Penn Petroleum Co., Inc., 188 F.2d 851 (2d Cir. 1951), is cited in support of the proposition that an "emergency" is a necessary prerequisite to a sale of all a corporation's assets in Chapter XI. Although the appellants correctly recite the holding of that case, the requirement there set forth is inapplicable to the instant situation in that the corporations here had previously been adjudicated bankrupts. Thus we need not concern ourselves with the problems that the Second Circuit sought to avoid in *Pure Penn,*

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[10]See General Order 48(2).

"that a Chapter XI plan could bring about the same result as ordinary bankruptcy proceedings . . . minus the protective provisions which are part of the latter, especially as to a sale of all the assets." *In re Pure Penn Petroleum Co., Inc., supra* at 855. *Accord, In re Northern Illinois Development Corp.*, 324 F.2d 104 (7th Cir. 1963), *cert. denied*, 376 U. S. 938 (1964).

There is likewise no merit to the appellants' other contention that the order confirming the sale was somehow vitiated by the referee's "reliance" on the recommendation of the creditors.[11] Although acceptance by a majority of the creditors is required prior to confirmation of an arrangement, there is no provision in the Bankruptcy Act dealing with ordinary bankruptcy liquidation which requires that a referee solicit, entertain, or follow creditors' recommendations or preferences. Since the price paid for the bankrupts' assets far exceeded their appraised value, we cannot substitute our judgment for that of the referee who, intimately familiar with the bankrupts' predicament, confirmed the sale.[12] *Cf. In re Marathon Foundry and Machine Co.*, 228 F.2d 594, 598 (7th Cir. 1955), *cert. denied*, 350 U. S. 1014 (1956). If the referee had confirmed the sale without affording the proponents of the plan an opportunity to talk to the committee, we could not say that such action would have constituted an abuse of discretion. That the referee allowed such overtures and then purported to "follow" the committee's recommendation did not constitute an abuse of discretion either, but rather reflected a commendable

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[11]The record indicates that counsel for the bankrupts and the proponent of the plan appeared before the creditors' committee on November 6, and therefore, we assume that they were aware of the committee's composition. However, they made no mention of this point to the referee when the hearing reconvened after the recess.

[12]We have yet to discover a convincing demonstration that the plan would have yielded substantially more for the creditors than the sale.

effort on his part to afford the fullest opportunity to the competing interests to be heard.[13]

If parties are to be encouraged to bid at judicial sales, there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended. From a reading of the record, we are convinced that the proponents of the plan were, in effect, "competing bidders," both at the time of the sale and thereafter. Once the sale of the assets to I.F.R.C. was confirmed, the existence of fraud, mistake, or a like infirmity would be necessary to set that confirmed sale aside. No allegations of such vitiating circumstances were made here. The bankrupts' amended plan filed on November 21 was merely a higher "bid," consideration of which was properly rejected by the referee. See 4A COLLIER ON BANKRUPTCY ¶ 70.98(17), at 1183-1193 (14th Ed. 1967). *Smith* v. *Juhan,* 311 F.2d 670 (10th Cir. 1962); *In re Marathon Foundry and Machine Co.,* 239 F.2d 122 (7th Cir. 1956), *cert. denied,* 353 U. S. 912 (1957).

After considering the appellants' other contentions, we conclude that they are without substance. The referee acted well within his discretion in denying the application for reconsideration. Nor did the district court err on November 20 and 21 in approving the actions of the referee.

Our decision in this case on the merits necessarily reflects a denial of I.F.R.C's motion to dismiss these ap-

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[13] At the hearing on November 21, the referee stated:

> I had a right to depend upon and rely upon the representations made to me by counsel for the creditors' committee.
>
> This was not the sole determining factor in the acceptance or approval of this bid. If I had felt at the time that the bid was inadequate, the decision of the creditors' committee certainly would not be the final one. I extended to them on the same theory that the law functions an opportunity to express their views, to express their desire, and they did so.

peals. *In re Central Metallic Casket Co., Inc.*, 273 F.2d 506 (7th Cir. 1960); *In re Tyne*, 261 F.2d 249 (7th Cir.), *cert. denied*, 359 U. S. 974 (1959). *Cf. In re Drive-in Development Corp.*, 371 F.2d 215 (7th Cir. 1966), *cert. denied*, 387 U. S. 909 (1967).

The orders appealed from are affirmed.

SUPREME COURT, U. S.

No. 226

Office-Supreme Court, U.S.
FILED
JUL 23 1968
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1968.

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being Creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

vs.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF FRANK M. WHISTON, TRUSTEE IN BANKRUPTCY OF WEBCOR INC., AND WEBCOR SALES COMPANY, BANKRUPTS.

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF FRANK M. WHISTON, TRUSTEE IN BANKRUPTCY OF WEBCOR INC., AND WEBCOR SALES COMPANY, BANKRUPTS.

STATUTES INVOLVED

11 U.S.C. 67c (Bankruptcy Act, Sec. 39c):

> A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within

such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

11 U.S.C. sec. 110, sub f (Bankruptcy Act, Sec. 70f):

The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever a sale of real or personal property of a bankrupt is made by or through an auctioneer employed by the court, receiver, or trustee, the auctioneer must be a duly licensed or authorized auctioneer in the place where the sale is to be conducted.

11 U.S.C. sec. 501 (Bankruptcy Act, Sec. 101):

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

11 U.S.C. sec. 701 (Bankruptcy Act, Sec. 301):

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

11 U.S.C. sec. 776 (Bankruptcy Act. Sec. 376):

If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 324 of this Act, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 321 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors: Provided, however, That an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

OPINION BELOW

The opinion of the United States Court of Appeals for the 7th Circuit is reported in 392 F 2d 893. The opinion is also printed in full in the Appendix, Page 37, of the Petition for Certiorari, but the attention of this Court

is called to the last paragraph appearing on Page 39 thereof, which is not an exact transcription from the opinion.

QUESTIONS PRESENTED

1. Whether this Court should review by certiorari the decision by the Court of Appeals, affirming the District Court order, which affirmed the Referee's orders of October 25, 1967 and November 7, 1967, adjudicating the Debtor a bankrupt and confirming the judicial sale.

2. Did the sale, after adjudication, for a sum far beyond the Court's appraisal, by competitive bidding, approved and confirmed by the Court, vest in the purchaser full equitable title to the property sold or was there a clear abuse of discretion.

STATEMENT

This Respondent, Frank M. Whiston, as Receiver and now Trustee in Bankruptcy of Webcor Inc. and Webcor Sales Company, formerly Debtors under proceedings in Chapter XI of the Bankruptcy Act, and now Bankrupts, believes it necessary, by reason of omission, and for clarification, to set forth the facts, for a more relevant summary thereof.

The condition of the Bankrupts before the proceedings were filed on July 5, 1967, was that its factories were shut down for two months prior thereto, with defaults in payroll and rents; the accounts receivable had been pledged and the inventories were unbalanced; when the Receiver took possession, the Bankrupts, then the Debtors under the Chapter XI proceedings, were not "going concerns", having only a skeleton staff of executives and office personnel requiring a weekly payroll of $30,000.

On July 6, 1967, the Debtors made application, on their own motion, for the appointment of a Receiver, and the Court appointed Frank M. Whiston as Receiver, who qualified immediately; the Receiver spent two weeks trying to raise money which was rejected by banks; at a meeting held with Commercial Discount Corporation, who had financed Debtors' receivables, the Receiver was informed of the opinion that the Debtors would need $500,000 for working capital and would, with said capital, lose $300,000 in six months operation; then the Receiver cut the skeleton staff, referred to hereinabove, to a force of twelve people, such as bookkeepers, watchmen and the like. The Debtors having failed for almost four months after the filing of the original proceedings under Chapter XI to file a plan, and having received three extensions of time from the Court to file schedules, ultimately filed on September 1, 1967, the Referee on October 12, 1967 ordered the debtor to file a plan of arrangement on or before October 25, 1967, and a hearing was set for the same date pursuant to Section 376(2) of the Bankruptcy Act, 11 U.S.C. Sec. 776, and due and proper notice thereof was given to all creditors and parties in interest.

On October 17, 1967, on the petition of the Receiver, an order was entered by the Referee for the return of bids in open court, based upon a guaranteed upset price of $1,030,000 made by International Fastener Research Corp.; said order provided for the appointment of appraisers and for notice of return of bids to creditors and the general public.

No petition for review by the district judge was filed to any of the foregoing orders, and the time for filing such petitions in review has long since expired.

On October 25, 1967, the Referee entered an order pursuant to Section 376 (2) of the Bankruptcy Act, 11 U.S.C. Sec. 776, adjudicating the Debtors as Bankrupts. It is true that the Bankrupts' attorney requested the order of adjudication be postponed until November 6, 1967, stating that a plan of arrangement had been discussed with outside parties and if such a plan did not materialize, there would be no further delay.

The Order of Adjudication was entered, pursuant to notice, on October 25, 1967 (A. 57), from which no review from the Referee's order was taken within the ten day statutory period, nor was any petition for review filed to the order of October 17, 1967, for the return of bids in open court for the sale of the assets, nor was any review taken on the order of October 12, 1967, ordering the Debtor to file a plan of arrangement on or before October 25, 1967 and for the hearing on the adjudication or dismissal pursuant to Section 376(2) of the Bankruptcy Act.

On November 2, 1967 a plan of arrangement was filed, without leave of Court, by the terms of which, after payment of priorities, general creditors over $100.00 were to be paid 50% in full, this amount to be paid on the basis of 20% on or about April 25, 1968 and 6% at the end of each year thereafter for five years, subject to pro ration however, if the total claims should exceed $2,800,000; the deferred payments were to be non-interest bearing notes of the Debtors, guaranteed by A. F. Dormeyer Corporation, which company was to lend $750,000 to the Debtors for working capital; A. F. Dormeyer Corporation was to receive 79% of the stock of Webcor, Inc. and to give Webcor shareholders 200,000 shares of its common stock.

On November 6, 1967, at 10 A.M., before the Referee, the Bankrupt filed its motion to vacate the Order of Adjudication, and during the course of said hearing, Mr. Nachman, attorney for the Bankrupt, suggested that the motion "be taken by the Court until the bids have been taken this afternoon to see what the highest bid is made in this Court and I believe, Your Honor, that will really establish the realities here as to what should be done". Mr. Nachman stated that he could go on at length extolling the virtues of the plan and establishing the financial ability of Dormeyer, who is really the proponent of this plan and stands behind the Debtor, "but it could very well be that this could be academic" and, therefore, he recommended that the motion be taken and went on to say, "if we can't have a reorganization because the bidding is so high as to be too attractive to the creditors, Your Honor, I, in all honesty, could not criticize the creditors or their representatives if this should be their view." At said hearing, Mr. Kenneth Prince, one of the attorneys for the Creditors Committee, stated as follows: "We would like to have an opportunity to do precisely what Mr. Nachman suggests. We would like to have the sale this afternoon, and following the sale we would like to have a conference where we can bring the Committee together. We will be 90% in attendance this afternoon, and we will make a determination and let the Court know what the Committee thinks is in the best interest of the Creditors."

As to what transpired at the hearing at 2 o'clock on November 6, 1967 is well known from the record. The high bid of $1,725,000.00 was made by International Fastener Research Corporation. Counsel for the A. F. Dormeyer Corporation, the outside party proposing the plan, sought to interrupt the hearing on bids, as bidding

was being made, to speak of an amended plan, but not to enter a bid. The Court at the conclusion of the bid aforesaid declared a recess for the purpose of receiving the recommendations of the Creditors' Committee. The Committe gave audience to counsel for Dormeyer, counsel for International Fastener Research Corp., and counsel for the Receiver. Dormeyer had stated orally to the Court upon the conclusion of the bidding that it amended, orally, its plan by depositing $1,800,000.00 to implement its plan but not as a bid for assets. The proposed deposit was alleged to be in the courtroom but was not made.

After hearing from the parties representing the various interests aforesaid, the Committee stated to the high bidder at the sale that if it would increase its bid by $50,000.00 to $1,825,000.00 the Committee would recommend to the Referee that such bid be accepted. The high bidder increased its bid accordingly and, upon the Court reconvening, Mr. Harold Lansing, one of the attorneys for the Creditors' Committee addressed the Court stating that the Committee speaks for $1,500,000.00 worth of creditors, that it heard from all parties, as suggested by the Court, and that "the vote was this, Your Honor, by a majority that we do business with a bidder under the bankruptcy sale and that we reject all further dealings with the debtor under a plan. We felt that it was better for the creditors and a much simpler procedure that we sell at this bankruptcy sale and International Fastener Research Corp. is willing to increase its bid to $1,825,000.00 and we recommend to the Court that the bid be accepted". The Referee, in his order of November 7, 1967, sets forth that said bid was substantially in excess of the appraisal herein. The Court appraisal was $1,081,422.33.

The Referee entered an order confirming the sale aforesaid and also entered an order denying the Bankrupt's motion of November 6, 1967, to vacate the adjudication.

On November 16 and 17, 1967, certain merchandise creditors involving claims of approximately $30,000.00 and stockholders, filed petitions for review of the Referee's order of November 7, 1967. The Receiver and the Creditor's Committee filed answers asking that the petitions be denied and the orders affirmed. The answer of the official Creditor's Committee states that the full committee, at a meeting on November 2, 1967, considered the plan for arrangement, and had voted that no consideration whatever would be given to the plan and that the highest bid at the sale should be accepted if the debtors failed to produce at the hearing scheduled for November 6, 1967, the sum of $1,030,000.00 in cash or a bank letter of credit; said answer further states that the bid of International Fastener Corp. was completely enforceable by contempt proceedings and that proper deposit had been made on said bid.

Meanwhile, on November 15, 1967, the three creditors with merchandise claims approximating $30,000.00 had filed an involuntary petition for the reorganization of these debtors under Chapter X, which petition bears the same cause numbers, being required to do so under the rules of this Court.

At the hearing on November 20, 1967, on the petition for review before the District Judge reference was made to a new plan, which was not then on file, but was filed with the Clerk of the Court on the succeeding day. At the conclusion of the hearing on November 20, 1967, the District Judge found that the involuntary petition for reorganization under Chapter X was not filed in good faith and accordingly dismissed said proceedings. As to the balance of matters on review, the case was sent back to the Referee for consideration of the plan of arrange-

ment and the motion to reconsider the orders already affirmed by the District Judge.

The new plan for arrangement and the motion to reconsider the order of adjudication and the order of sale were filed on the morning of November 21, 1967.

The new plan contemplated payment of 50% on the dollar for general creditors immediately upon confirmation of the plan instead of over the period of five years and proposed that if the plan were not consummated and the assets were resold, the Debtor would make up the difference between the amount then received for the assets and $1,825,000.00. A deposit of $1,000,000.00 was made to guarantee the plan. Subsequently, on demand of the attorney for A. F. Dormeyer Corporation, this deposit was returned.

The Referee denied the motion to reconsider and within the succeeding hour the sale of assets was consummated by payment of the full cash purchase price to Frank M. Whiston, Trustee in Bankruptcy, and delivery by the said Trustee in Bankruptcy of a Bill of Sale, there having been no stay.

During the course of the hearing before the Referee on the morning of November 21, in open court, parties in attendance thereat were advised orally of the filing of an appeal by parties other than the Bankrupt or Debtor, from the order entered on the previous day by the District Judge, and upon conclusion of the hearing, notice was given that at 2 P.M. of the same day, November 21, the appellants would go before the District Judge to ask that the amount of a supersedeas bond be fixed. The District Judge after hearing arguments denied the supersedeas and denied an oral motion for an injunction against the execution of the order of sale.

An involuntary petition under Chapter X, filed by the same creditors who are parties hereto, was found on November 20, 1967 by the District Judge, not filed in good faith and dismissed, pursuant to order of like date; no appeal was taken from said order with relation to dismissal of the Chapter X proceeding. The index in the petition for certiorari (iii) refers to said order only as a denial of petition for review.

Webcor Inc. had been listed on the Midwest Stock Exchange but was delisted two months prior to the filing of the proceedings herein. Of the issued and outstanding Stock, 49% thereof is owned and controlled by the Haffa family, stockholders who are Petitioners herein. Webcor Inc. and Webcor Sales Company, Bankrupts were made parties respondent herein.

REASONS FOR DENYING THE WRIT

I.

There is no conflict in the decision of the Court of Appeals below with the decision of any other Court of Appeals or with the United States Supreme Court, nor is there any ground for granting certiorari.

Petitioner cites the case of *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 150, 63 S. Ct., 133, 137 (1943) Cert. den., which case Petitioner says is "not abrogated by statute" but Petitioner is in error in relation thereto. The statute involved in said case is section 39c of the Bankruptcy Act, as amended in 1960, 11 U.S.C. sec. 67c. The foregoing case cited by Petitioner was decided in 1943.

In the matter of *Acme Furnace Fitting Company, Bankrupt*, 302 F 2d 318 (7th Cir. 1962) the Court quoted the pertinent part of the foregoing section on page 320, as follows:

> "§ 67(c). A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. *Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final.* * * *" (Emphasis added.)
>
> The last italicized sentence shown above was added by the 1960 amendment. It makes clear that a petition for review must be filed within the prescribed ten day period or within such extended time

as the court may allow upon a petition for such extension filed within the same ten day period. 2 Collier, Bankruptcy sec. 39.01 at page 1468.[1]

[2] Appellant failed to comply with the provisions of Section 39, sub. c of the Bankruptcy Act, as amended, and is barred from challenging the orders he belatedly sought to have reviewed. There is no error in the order of the district court affirming the referee's denial of such review."

In *Hardesty* v. *Keightley,* 361 F 2d 751 (4th Cir. 1966), that Court similarly holds that the ten day period thus prescribed is not extended by filing a motion for rehearing, for reconsideration, or for vacation of the order.

Similarly, the case of *St. Regis Paper Co.* v. *Jackson* 369 F 2d 136, 137 (5th Cir. 1966) holds that the ten day period to petition for review, as aforesaid, is mandatory and jurisdictional.

Petitioners choose to invoke precedent under Chapter X and Chapter XI cases, notwithstanding the fact that the case at bar involves a company which had been adjudicated bankrupt and a sale made after said adjudication in bankruptcy, and approved and confirmed by the Court. The sale was made subsequent to a court ap-

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[1] "Section 39c was amended in 1960 to remove the uncertainty as to the finality of a referee's order. * * *

"Under this prior wording the Supreme Court of the United States had held in *Pfister* v. *Northern Illinois Finance Corp.,* 317 U.S. 144, 63 S. Ct. 133, 87 L.Ed. 146 (1942) that there was no limitation upon the discretion of the bankruptcy court to entertain a petition for review after the expiration of the 10 day period. The 1960 amendment now makes it clear that a petition for review must be filed within the prescribed ten day period or within such extended time as the court may allow upon petition for such extension, itself filed within such ten day period. * * *"

praisal which evaluated the property at $1,081,422.33. Bidding was highly competitive and the sum of $1,825,000.00 was the highest bid, approved and confirmed.

The cases cited by Petitioners involved proceedings under Chapter X and XI, none being comparable to the case at bar wherein an order of adjudication had been entered. The law, in such cases as this, is clear and is without conflict.

None of the petitions for review, other than an application to reconsider sought upon the Referee's orders, to the District Judge were brought by the Debtor, but rather by the following: A. F. Dormeyer Corporation, merchandise creditors of some $30,000.00 who had filed the Chapter X proceeding (dismissed as not being in good faith), and certain stockholders, principally members of the Haffa family who likewise claimed to be substantial creditors, which claims may be suspect by reason of their control of Webcor Inc., nor did the Bankrupt file the appeal below, other than to become intervenors.

A highly important and vital omission appears in the Petition for Certiorari, page 6, where quotation is made of 11 U.S.C. sec. 776, sec. 376 of the Bankruptcy Act. The omission consists of the following opening phrase of the statute which should precede the sentence set forth therein: "If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 324 of this act, are not duly filed, *or if an arrangement is not proposed in the manner and within the time fixed by the court,* or if an arrangement is withdrawn . . ." (emphasis added). Petitioner cited the aforesaid section, as it read prior to amendment by Public Law 85-732, 85th Cong. 2d Sess., approved August

23, 1958. Obviously, this omission is of considerable importance herein, as is shown by the order of the Referee of October 25, 1967, wherein the Court adjudicated the Debtor to be a bankrupt (A 56). In said order, the Referee follows the foregoing statute in every respect.

In the propositions of law relied upon, Petitioner cites *In re*: *Pure Penn Petroleum Company,* 188 F 2d 851 (2nd Cir. 1951) which is a Chapter XI proceeding wherein the Court made comparisons as to the provisions of Chapter X and Chapter XI regarding liquidation. The Court there regarded liquidation as allowable only where assets are of a perishable nature or in imminent danger of diminution. The Court declares Chapter X proceedings may have a plan of liquidation, or, liquidation after an order of adjudication. The Court points out that in Chapter XI there is no such provision. Reference is made to the fact that section 101 of the Bankruptcy Act, 11 U.S.C. 501, states "the provisions of this chapter shall apply exclusively to proceedings under this chapter", and points out that the report of the Senate Judiciary Committee, in connection with the 1938 revision of the Bankruptcy Act, states that section 101 aforesaid "prevents the extension and application of any provisions of Chapter X to other chapters of this bill".

Further, section 301 of Chapter XI, 11 U.S.C. sec. 701, contains the provision that "the provisions of this chapter shall apply exclusively to proceedings under this chapter". In the Pure Penn Petroleum case, cited by Petitioner, it is indicated that an emergency is required to support a sale in Chapter XI. As is stated by the Court of Appeals below, that requirement is not applicable to the instant case in that the corporations here have previously been adjudicated bankrupts. In the *Pure Penn* case, the Court

says, on page 856 "as there was no stay or supersedeas bond, and as the district court had jurisdiction, if the sale was completed and confirmed before the appeal, the sale can not be undone, if the purchase was bona fide; i.e., not made indirectly for the Debtor or for some other party or parties to the Chapter XI proceeding". As must necessarily be repeated by the respondent to the petition herein, the case at bar involves a corporation that has been adjudged bankrupt, rather than any kind of a chapter proceeding. It is of some further importance to note that no review was ever taken of the Referee's order of October 17, 1967, for the return of bids for the sale of the assets.

So many differences distinguish the case at bar from the *Pure Penn* case, relied upon by Petitioner, which was pending as a Chapter XI proceeding, with the Debtor in possession. Under a modification of the plan in the *Pure Penn* case, Debtor proposed a private sale, with no appraisal, and more importantly there was no order of adjudication.

Petitioner makes much of repeated statements that the Bankrupt was a publicly held corporation. It was, in fact, a corporation virtually out of business for two months before the filing of the proceedings herein, and 49% of its stock was held by the Haffa family. An outsider sought the Debtor's reorganization whereas Chapter XI is for the Debtor to pursue, and herein, the Debtor is a party respondent to the proceedings.

In seeking to invoke the jurisdiction of this Court, Petitioner shows no precedent to establish any conflict with the case at bar, which involves a confirmed sale of the Bankrupt's property. Each of the Chapter X cases cited is not in point. The petition for Chapter X, which

had been filed herein, was dismissed for lack of good faith (A. 53).

Petitioner for the purpose of exhibiting conflict, calls the Court's attention to *S.E.C.* v. *American Trailer Rental Co.,* 379 U.S. 594, 85 S.Ct. 1044 (1940), wherein the Court on page 613 says it does not disagree with the holding of the *U. S. Realty* case, 310 U.S. 434, 60 S.Ct. 1044 (1940), which involved very substantial public debt, that there is no absolute rule requiring Chapter X to be utilized in every case in which the Debtor is publicly owned, and that as a general rule Chapter X is the appropriate proceeding for adjustment of publicly held debt. In the case at bar there is no publicly held debt. And the necessity for a finding of good faith is required. Again, the Debtor in the case at bar had been adjudicated a bankrupt; also, the erstwhile proceeding under Chapter X has been dismissed because of lack of good faith.

Petitioner cites *National Surety Company* v. *Coriell,* 289 U.S. 426 (1933), an equity proceeding, where the Court stated it was improper for the district court in a receivership to pass upon the wisdom and fairness of a plan of reorganization, in the equity proceeding and the rights of non-assenting creditors without definite information including an appraisal, and this case ultimately wound up in bankruptcy. There is no application of this equity receivership to the case at bar, wherein the Debtor had been adjudicated for failure to file a plan, and a judicial sale was completely consummated.

Again, a further case cited, not applicable herein, is *In re: Solar Mfg. Co.,* 176 F 2d 493 (3rd Cir. 1949), involving particular sections regarding liquidation under a plan, but again the case at bar involves a company which was adjudicated a bankrupt. *Arguendo,* if it were

assumed that Chapter X was applicable, it might well have been considered an emergency after carrying along a closed business for four months, and the continuing lethargy of the Debtor, with a continuing expense of $35,000 per month. The foregoing citation again involves a Chapter X proceeding, which type of proceeding was dismissed herein for lack of good faith and not appealed.

The argument and the cases relied upon by the Petitioner are completely distinguishable from the instant case and the amended statutes, where omissions had been made by Petitioner, set forth hereinabove, provide no basis for granting the request for certiorari on any of the grounds stated.

II.

The law on the subject of the approval and confirmation of the sale of assets, after adjudication in bankruptcy, made by competitive bidding in open court, resulting in a sum of approximately 67% more than court appraisal, grants a full equitable title to the purchaser, is well settled and therefore there is no basis for granting the request for certiorari on the grounds stated.

Petitioner, again pursues the subject of conflict of precedent by continuing the repetition of cases under Chapter X and Chapter XI, which do not obtain in the instant case. The law is indeed well settled as set forth in the opinion of the Court of Appeals, below.

The rule is very well settled that a sale may be reversed only upon a clear abuse of discretion. This rule is set forth in Collier on Bankruptcy, 1967, Vol. 4A, sec. 70.98, pp. 1183-1186.

> "The setting aside of a sale is different from both the denial of confirmation and the reversal on review

of or appeal from an order of confirmation. It presupposes an otherwise complete sale—that is, normally, a sale that requires confirmation and has been duly and definitely confirmed. Its function is one of strictly equitable jurisdiction, namely to avoid a sale, public or private, that is tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction. Naturally, such defects would equally justify the denial of confirmation. But proceedings to 'set aside' a sale offer an opportunity to attack on the grounds mention a sale already finally confirmed unless the particular defect alleged was examined in the confirmation proceedings and was held to be without merit, in which case the principle of res judicata would apply. Proceedings to set aside are not a second edition of the confirmation proceedings. They cannot be set in motion for reasons other than defects of such gravity as to 'shock the conscience of the chancellor', and even irregularities of a quite serious kind that might have been, but were not, asserted in the confirmation proceedings are definitely lost and cannot be used as a ground for the request to set aside."

Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons, such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale, and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of assets being thus liquidated. *J. J. Sugarman* v. *Davis*, 203 F 2d 931, (10th Cir. 1953).

The court below found that the proponents of the plan were, in fact, "competing bidders", both at the time of the sale and thereafter; and that the Bankrupt's amended plan filed on November 21, 1967 was merely a higher "bid", consideration of which was properly rejected by the Referee. And the court below found properly that the Referee acted well within his discretion in denying the application for reconsideration, and that the District Court did not err on November 20 and 21 in approving the actions of the Referee.

A leading decision was made *In re*: *Marathon Foundry and Machine Company,* 228 F 2d 594 (7th Cir. 1955), Cert. Den. 350 U.S. 1014 (1957). The court would not substitute its own discretion for the District Court, stating that it should reverse the order appealed from only if satisfied that the court in entering it was guilty of abuse of discretion. The facts involved the sale of stock of Bethlehem Foundry & Machine Co. at an amount in excess of a court appraisal in an instance where the objecting debtor had obtained a commitment for a loan with the Bethlehem stock as collateral; neither debtor, or its sole stockholder, bid at the sale. A further decision, on a second challenge, was rendered *In re*: *Marathon Foundry and Machine Company,* 239 F 2d 122 (7th Cir. 1956), Cert. Den. 353 U.S. 912 (1957). The court held that after a sale had been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties.

In the case of *Lionel Millard Smith, Bankrupt,* v. *Edward N. Juhan, Trustee,* 311 F 2d 670 (10th Cir. 1962), the court in upholding the sale in a straight bankruptcy case, neither a Chapter X nor Chapter XI proceeding, which held a judicial sale regularly made with notice and in

the manner prescribed by law, stating that confirmation would not be denied or set aside unless the price is so grossly inadequate as to shock the conscience of the court, and quotes from, among others, the decision in *Laurel Oil and Gas Co.* v. *Morrison,* 212 U.S. 291, 29 S.Ct. 394, the statement of this court "the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids." The court cites in its decision *J. J. Sugarman Co.* v. *Davis,* supra, and *In re: Marathon Foundry and Machine Company,* 239 F 2d 122, Cert. den. 353 U.S. 912 (1957) and *Breeding Motor Freight Lines, Inc.* v. *Reconstruction Finance Corporation, et al.,* 172 F 2d 416, 424, (10th Cir. 1949) Cert. den. 338 U.S. 814, 70 S.Ct. 54.

In re: Stanley Engineering Corporation, 164 F 2d, 316, 319, 320 (3rd Cir. 1947) cert. den. sub. nom. *Root* v. *Galman,* 332 U.S. 847 (1948) the Court refers on page 318 to Section 70f of the Bankruptcy Act, 11 U.S.C. sec. 110, sub ,f: "* * * Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraisal value. * * *" And on page 319, the Court says, "Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion." And again says "To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final."

And in *Pewabic Mining Co.* v. *Mason*, 145 U.S. 349, 1892, page 356, 12 S.Ct. 887, page 888, L Ed. 732, this Court said: "Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matter which ought to have been attended to by the complaining party prior thereto. * * *"

It is respectfully submitted that there is no conflict in the well established precedent on the question herein and no basis for granting the request for certiorari.

CONCLUSION

For reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

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